IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6438

EWELL SCOTT, etc.,

Petitioner,

v.

KENTUCKY PAROLE BOARD, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is set out in the Appendix, pp. 21, 23. The opinion of the United States District Court for the Eastern District of Kentucky is also unreported and is set out in the Appendix (hereinafter A.), pp. 14-16.

JURISDICTION

The judgment of the Court of Appeals was entered January 15, 1975 (A. 21). On April 2, 1975, the Court of Appeals denied petitioners' petition for rehearing and suggestion of rehearing *in banc* (A. 23). The petition for a writ of *certiorari* and a motion for leave to proceed *in forma pauperis* were filed on April 29, 1975, and both were granted on December 15, 1975. The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constit. amend. XIV: "[N]or shall any State deprive any person of life, liberty or property without due process of law . . . "

Ky. Rev. Stat. §439.330:

(1) The board shall:

(a) Study the case histories of persons eligible for parole and deliberate on that record;

(b) Conduct hearings on the desirability of granting parole;

(c) Impose upon the parolee or conditional release such conditions as it sees fit;

(d) Order the granting of parole;

(e) Issue warrants for persons charged with violations of parole and conditional release and conduct hearings on such charges;

(f) Determine the period of supervision for parolees and conditional releasees, which period may be subject to extension or reduction after recommendation of the division is received and considered;

(g) Grant final discharge to parolees and conditional releasees.

(2) The board shall adopt an official seal of which the courts shall take judicial notice.

(3) The orders of the board shall not be reviewable except as to compliance with the terms of KRS 439.250 to 439.560.

(4) The board shall keep a record of its acts, shall notify each institution of its decisions relating to the persons who are or have been confined therein, and shall submit to the governor a report with statistical and other data of its work at the close of each fiscal year.

Ky. Rev. Stat. §439.340:

(1) The board may release on parole such persons confined in any adult state penal or correctional institution of Kentucky as are eligible for parole. All paroles shall issue upon order of the board duly adopted. As soon as practicable after his admission and at such intervals thereafter as it may determine, the Division of Institutions shall obtain all pertinent information regarding each prisoner, except those not eligible for parole. Such information shall include his criminal record, his conduct, employment and attitude in prison, and the reports of such physical and mental examinations as have been made. The Division of Probation and Parole shall furnish the circumstances of his offense and his previous social history of the institution and the board. The Division of Institutions shall prepare a report on such information as it obtains. It shall be the duty of the Division of Probation and Parole to supplement this report with such material as the board may request and submit such report to the board.

(2) Before granting the parole of any prisoner, the board shall consider the pertinent information regarding the prisoner and shall have him appear before it, or one or more members

for interview and hearing. A parole shall be ordered only for the best interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the board believes he is able and willing to fulfill the obligations of a law abiding citizen.

(3) The board shall adopt such rules or regulations as it may deem proper or necessary with respect to the eligibility of prisoners for parole, the conduct of parole hearings, or conditions to be imposed upon parolees. Regulations governing the eligibility of prisoners for parole shall be in accordance with prevailing ideas of correction and reform.

(4) Whenever an order for parole is issued it shall recite the conditions thereof.

QUESTIONS PRESENTED

1. Does the minimum guarantee of procedural due process safeguarded by the Fourteenth Amendment apply to state parole release proceedings?

2. If the Fourteenth Amendment's guarantee of procedural due process apply to state parole release proceedings, what are the minimum procedures that must be employed by a state parole board in conducting such proceedings?

STATEMENT OF THE CASE

This action was instituted pursuant to 42 U.S.C. §1983 in the United States District Court for the

Eastern District of Kentucky by Ewell Scott and Calvin Bell[1] as a class action on behalf of all inmates incarcerated in the Kentucky penal system who are subject to the jurisdiction of the Kentucky Parole Board (hereinafter referred to as the Board of Parole Board).[2] The action challenged the constitutionality of the absence of minimal procedural safeguards in parole release proceedings conducted by the Parole Board, which has the authority, pursuant to *Ky. Rev. Stat.* §§439.330 and 439.340, to release on parole all eligible inmates in the Kentucky penal system.[3] The complaint (A. 2), seeking declaratory and injunctive relief, was tendered along with a motion for leave to proceed *in forma pauperis* and properly authenticated affidavits.

In their complaint, the petitioners set forth allegations describing the paucity of procedures followed by the Parole Board in parole release hearings (Complaint,

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[1]As more fully set out in the petitioners' response to respondents' suggestion of mootness, the named petitioner Scott was released on close parole supervision on November 26, 1975, and is subject to the jurisdiction of the Parole Board until 1984. Counsel has learned that the named petitioner Bell, who was released on parole during the course of this action, is dead.

[2]A small number of inmates in Kentucky serving life sentences are permanently ineligible for parole pursuant to *Ky. Rev. Stat.* §435.090, and are not included in the class on whose behalf this action was brought.

[3]A more complete discussion of the statutes and regulations governing the operations of the Parole Board is contained on pp. 5-7, *infra*.

paras. 6-10, A. 4, 5).[4] These allegations form an essentially complete picture of the parole release decisionmaking process of the Kentucky Parole Board. They are recounted below, preceded by a description of the pertinent Kentucky statutes and regulations relating to parole release.

In Kentucky, the jury is vested with the primary responsibility for fixing the sentence of a convicted defendant. This sentence is expressed as a definite term of years chosen within a range of years for different class felonies. *Ky. Rev. Stat.* §532.060 (1) and (2). Under limited circumstances, a judge can reduce the sentence imposed by a jury. *Ky. Rev. Stat.* §532.070. The ultimate responsibility for determining the actual time of release is delegated to the Parole Board. *Ky Rev. Stat.* §532.060 (3).

The legislative mandate of the Kentucky Parole Board is exceptionally broad. *Ky. Rev. Stat.* §439.330, which defines the parameters of the Board's powers, orders the Board to "[s]tudy the case histories of persons eligible for parole, and deliberate on that record," "[c]onduct hearings on the desirability of granting parole," "[i]mpose upon the parolee . . . such conditions as it sees fit," and "[o]rder the granting of parole. . . ." The orders of the Board are expressly

[4]Because the District Court dismissed the complaint without requiring an answer by the defendants, the allegations of the complaint are deemed to be true for the purpose of testing the constitutional correctness of the District Court's action. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 476-77 (1972); *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Fischer v. Cahill*, 474 F.2d 991 (3d Cir. 1973).

nonreviewable except as to compliance with the provisions of its organic mandate. *Ky. Rev. Stat.* §439.330 (3). In amassing information that the Board deems relevant to its parole release decision, it relies heavily on the Kentucky Department of Corrections, its mother agency, which is required by *Ky. Rev. Stat.* §439.340 (1), to compile for each inmate such information as previous social history, circumstances of the offense, criminal record, and employment and attitude in prison. By statute, the Board also relies on prison officials, who have a duty to furnish the Board reports on the conduct and character of any prisoner and any other facts deemed pertinent by the Board, *Ky. Rev. Stat.* §439.380, and prosecuting attorneys, who must transmit to the Board a concise statement of the facts adduced at trial or at a hearing on a guilty plea. *Ky. Rev. Stat.* §439.370. The Board also is authorized by *Ky. Rev. Stat.* §439.335 to use the polygraph, truth serum, or any scientific means for personality analysis in its parole release decisionmaking.

Before granting the parole of any prisoner, the Board is directed to "consider the pertinent information regarding the prisoner and shall have him appear before it, or one or more members for interview and hearing." *Ky. Rev. Stat.* §439.340 (2). Following the hearing, the Board can order a parole "only for the best interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed only when arrangements have been made for his proper employment or for his maintenance and care, and when the Board believes he is able and willing to fulfill the obligations of a law abiding citizen." *Id.*

Pursuant to legislative directive, the Board is commanded to promulgate regulations governing the basic phases of its operations. *Ky. Rev. Stat.* §340 (3). These regulations, which "shall be in accordance with prevailing ideas of correction and reform," *Id.*, were updated effective April, 1975. They are appended to this Brief in their entirety as Appendix A. They begin by setting minimum time spans an inmate must serve before becoming eligible for parole reivew. *Ky. Admin. Reg.* 501, 1:010 §§2-7. These spans range from four months for persons serving a one year sentence to two years for persons serving a sentence of from nine to fifteen years; persons serving a sentence of from fifteen to twenty-one years must serve a minimum of four years; those with sentences of over twenty-one years must serve a minimun: of six years. In its discretion, the Board may "review the case of any inmate for parole consideration prior to his eligibility date if it appears advisable to do so." *Ky. Admin. Reg.* 501, 1:010 §8. Following a prisoner's initial parole review, any further reviews "shall be at the discretion of the Board." *Ky. Admin. Reg.* 501, 1:010 §§2, 3, 4.

Next, the regulations turn to procedures and substantive criteria employed in paroie release hearings.[5] The pertinent regulation, in full, reads:

[5]In the required public hearing conducted on these regulations, the undersigned counsel appeared for the members of the class in this action and urged the Board, orally and in writing, to adopt parole release procedures necessary to comport with what, by then, the vast majority of courts of appeals had held to be minimally required by the Constitution. 1 Ky. Interim Leg. Rec. 45 (No. 7 1974-75). As the regulation evinces, none of these recommendations were adopted.

"The parole hearing will consist of an interview by the board, or a quorum of the board, with the inmate involved. In instances when the inmate is too ill to appear before the board, the board may, at its discretion, appoint one (1) member to interview the inmate in the hospital where he is confined and report back to the remaining members. In this instance, as in all cases, a vote by a quorum is required before action is taken. In reaching their decision, the board shall consider:

(1) Current offense;
(2) Prior record;
(3) Institutional adjustment and conduct;
  (a) disciplinary reports;
  (b) loss of good time;
  (c) work and program involvement.
(4) Attitude toward authority;
  (a) before incarceration
  (b) during incarceration
(5) History of alcohol or drug involvement;
(6) History of prior probation, shock probation or parole violations;
(7) Educational and job skills;
(8) Prior employment history;
(9) Emotional stability;
(10) Mental capacities;
(11) Terminal illness;
(12) History of deviant behavior;
(13) Official and community attitudes toward accepting inmate back in the county of conviction;
(14) Review of parole plan;
  (a) housing;
  (b) employment;
  (c) need for community treatment and follow-up resources such as: 1. Halfway Houses and residential treatment centers, 2. Compre-

hensive care centers, 3. Service centers, 4. Individual counselling with private social agencies and private treatment resources such as psychiatrists and psychologists;

(15) Any other factors involved that would relate to the inmate's needs and the safety of the public."

Ky. Admin. Reg. 501, 1:010 §9.

The remainder of the regulations deal with parole revocation and are not germane in this action.

Illuminating the statutes and regulations comes the description of the Kentucky parole release process contained in the allegations of the complaint. In studying the case histories of inmates eligible for parole, the Board and its members rely entirely on information contained in the file of the inmate that is maintained by the institution in which the inmate is confined or by the Kentucky Department of Corrections. There is no standard way in which information is excluded or included in the file, organized in the file, or tested for relevancy, accuracy, reliability, bias, or prejudice. The inmate has no access to his file, is not aware of its contents, has no knowledge of what material is being considered by the Board in reaching its decision, and has no opportunity to rebut or explain adverse or erroneous information in the file. (Complaint, para. 7, A. 4).

The inmate is notified in advance of the time of the scheduled hearing with a member or members of the Board. He is not notified of what issues or information the Board will be considering in making the parole decision. At the interview before the Board the inmate is permitted to speak and ask questions, but is not permitted to present evidence and arguments to justify

his or her release; The inmate also is not permitted to challenge, cross-examine, or interpret the evidence that will be used by the Board in its decision to grant or deny parole. No counsel or lay advocate is permitted to appear or speak in the inmate's behalf at the hearing. (Complaint, para. 8, A. 4).

No record, transcript, or summary of the testimony and questions at the interview is prepared and maintained. The Board announces its decision orally, often at the conclusion of the hearing, and generally only with minimal deliberation. Occasionally, oral reasons for the decision are given, but written reasons are not given, and there is no statement of the factual basis for the decision, nor of the rules, standards, or criteria used in making the decision. (Complaint, para. 9, A. 5). At no time, either before or after the decision, is the inmate advised by the Board as to what rules, standards, or criteria will be used by the Board in determining whether to grant or deny parole, nor is the inmate advised as to how to conform his or her conduct, or as to what is expected, so that parole may be granted at a future date. (Complaint, para. 10, A. 5).[6]

In the complaint, the named petitioners also alleged the particular circumstances surrounding what at the time were the last interviews given to them by the Board. The petitioner Scott stated that the majority of the discussion at the interview concerned the facts

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[6]At the time this action was filed, the Board had no published criteria similar to those recently announced in the Kentucky Administrative Register. See p. 7, *supra*. Under the record as it stands, it cannot be assumed that this list of criteria is formally supplied to prisoners either prior to or at the parole release hearing.

surrounding his conviction, even though, while incarcerated, he had enrolled in school, was participating in group therapy programs, and had not committed any disciplinary infractions. After very brief consideration by the Board, he was informed that he needed "more time to get together" and was postponed for further parole consideration for twenty-four months. (Complaint, para. 13, A. 5).

The complaint continued by alleging a number of constitutional deficiencies in the practices and procedures employed by the Board in the conduct of parole release hearings. The most prominent of these included:

(1) The prospective parolee is denied notification of and access to any of the material considered by the Board in reaching its decision.

(2) At the parole hearing–which often lasts only minutes–the inmate is not afforded a meaningful opportunity to present evidence in his or her behalf.

(3) At no time throughout the proceedings is an inmate permitted to be represented by counsel or by a lay representative or advocate.

(4) The unsuccessful inmate neither is provided a written statement of reasons explaining the basis for denial nor is informed of the criteria, if any, used by the Board in reaching its decision, nor of the conditions or requirements which, if fulfilled, would allow the inmate to be favorably considered by the Board. (Complaint, para. 14, A. 6). On the basis of these allegations, the petitioners sought declaratory and injunctive relief designed to require modification of the procedures employed by the Board in conformance with due process.

In a memorandum opinion, the District Court–without the benefit of any responsive pleadings–overruled the petitioners' motion for leave to proceed *in forma pauperis* and dismissed the action. The opinion, primarily citing pre–*Morrissey v. Brewer*, 408 U.S. 471 (1972) cases that had rejected similar challenges, concluded that the denial of parole "wreaks no such 'grievous loss' " as to activate the minimum procedural safeguards of the Fourteenth Amendment (A. 14).[7] The plaintiffs duly filed a motion for leave to appeal *in forma pauperis*, but this motion was denied by the District Court on the ground that the appeal was not taken in good faith. See 28 U.S.C. §1915 (a).

Thereafter, the plaintiffs moved the Court of Appeals for leave to appeal *in forma pauperis*, and this motion was granted. Following full briefing and argument, the Sixth Circuit affirmed the judgment of the District Court. In its *per curiam* opinion, the court, after skeletally reviewing the applicable facts, baldly concluded that "the complaint alleged no violation of rights guaranteed to the plaintiffs under the United States Constitution." (A. 21). The petitioners filed a petition for rehearing and suggestion of the appropriateness of a rehearing *in banc*, citing post argument decisions rendered by two other Courts of Appeals ruling that minimum procedural safeguards of due process apply in parole release proceedings. The Sixth Circuit denied the petition, and, on December 15, 1975, this Court granted *certiorari*.

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[7]The District Court was not writing on a clean slate in Kentucky. In *Ornitz v. Robuck*, 366 F.Supp. 183 (E.D. Ky. 1973) and *Harrison v. Robuck*, 508 S.W.2d 767 (Ky. 1974), due process attacks similar to the one in the present case were firmly rejected.

On January 19, 1976, in response to a suggestion of mootness filed by the respondents and a subsequent response in opposition to the suggestion of mootness and a motion to substitute named petitioners or, in the alternative, to intervene filed by the petitioners, the Court entered an order deferring the mootness question to the hearing of the case on the merits.[8]

SUMMARY OF ARGUMENT

A. The opinions below, rejecting outright the threshold applicability of the due process clause to parole release proceedings, not only run counter to the trend of recent decisions in this Court affording due process protections to individuals in a variety of settings whose liberty or property interests are impaired by government action but also squarely conflict with the overwhelming weight of judicial authority and scholarly opinion on the issue. More fundamentally, the decisions below rest on a distortion of the realities of the parole system–its role in the sentencing and correctional process, its operations, and its impact on inmates.

Given this Court's recognition of the value of affording due process protections to students facing suspension, parolees, probationers, prisoners in disciplinary hearings, and others, it is only logical and fair that due process likewise be afforded to prisoners eligible for parole review. Important interests of the state and the inmate are at stake in this process, called

[8]The petitioners respectfully refer the Court to their motion and supporting brief for a full development of the mootness issue.

in a report by a subcommittee of the House Judiciary Committee "the single most inequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. at 3 (1975). These interests were largely overlooked in the decisions below, which are premised on a flawed and incomplete view of the parole release process. Far from an unfathomable system best left to unhindered expertise and discretion, the concept of parole embodies three relevant elements militating in favor of due process protection. *First*, parole is inseparable from the sentencing process. *Second*, release on parole is the predominant mode of release for prisoners today. *Finally*, parole release is not leniency but is specifically considered by sentencing judges in fixing sentences. The partially predictive and discretionary nature of the process, moreover, is more reason–not less–for the introduction of due process safeguards into parole decisionmaking. Recent actions by the U.S. Board of Parole, in structuring its discretion, subvert the perspective of the parole process contained in the decisions below and point out the necessity for procedural safeguards.

Likewise, the nature of the prisoner's interest in parole is substantial. The expectation of parole release is one that is realized for a very large number of prisoners; that is expected to be so realized by legislators in setting statutory maxima and by judges or juries in setting what, in effect, are partially indeterminate sentences; and that is realized or not by a process that essentially involves a deferred determination of the wisdom of continued incarceration or conditional liberty. Far from a thin hope, parole release is a reality for most prisoners today.

This reality has been recognized by the vast majority of courts addressing the issue. Since *Morrissey v. Brewer*, 408 U.S. 471 (1972), buttressed by *Wolff v. McDonnell*, 418 U.S. 539 (1974), no court of appeals has held to the position that due process does not apply to parole release proceedings. This position is compelled by the Court's perception in *Morrissey* of parole as "an integral part of the penological system," and of the necessity for a hearing even when the exercise of discretion is involved, 408 U.S. at 477, 483, and by the implicit recognition in McDonnell that liberty interests are implicated in parole release proceedings.

B. Once it is determined that parole release proceedings qualify for due process protection, "the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. at 481. Because of the absence of a concrete factual record in this case, the Court may decide, after ruling on the applicability question, to go no further and remand the case to the District Court for the development of a record upon which the contents of the required procedures may sharply be forged.

Should the Court reach the question, the petitioners contend that the interests of the Board in the efficient administration of the parole process, is not denying or granting release on the basis of inaccurate or incomplete information, and in the fair treatment of its constituency, when balanced with the interest of the prisoner in release, counsel in favor of the appropriateness of the following procedures:

(1) The right to adequate notice of, and reasonable access to, factual information upon which an adverse decision may be predicated; except, in cases where law

enforcement proceedings or investigation will be interfered with, personal safety is unduly jeopardized, or a clearly unwarranted invasion of privacy will result, narrowly drawn exceptions may be propounded to control access to the particular material.

(2) At the time of each parole review, the right to appear in person for a reasonable time before the Board, a panel of the Board, a Board member, or a hearing examiner; to submit supporting written material in advance of the hearing for inclusion in the file made available to the person conducting the hearing, and to rebut information or recommendations that may prompt a denial or postponement of parole.

(3) The right to the assistance of an advocate – either a lawyer, a law student, another inmate, a family member, a friend, or a member of the correctional staff–throughout the proceedings. This right should include an opportunity for the advocate to have access to, and consult with the prisoner about, the material referred to in paragraph (1) above. Petitioners recognize that the role of counsel can be structured so as to limit participation both as to time and manner.

(4) The right to a written statement specifying, with evidentiary and factual support, the reasons for denial and, when feasible, the conditions, which if fulfilled, would likely result in favorable parole consideration at a specified future date.

ARGUMENT

I.

PAROLE RELEASE PROCEEDINGS IMPLICATE INTERESTS IN LIBERTY PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In the opinions below, the threshold applicability of the due process clause to parole release proceedings conducted by the Kentucky Parole Board was rejected outright. This rejection not only runs counter to the trend of recent decisions in this Court affording due process protections to individuals in a variety of settings whose liberty or property interests are impaired by governmental action, but also squarely conflicts with the overwhelming weight of judicial authority and scholarly opinion on the very issue presented here. More fundamentally, the decisions below rest on a distortion of the realities of the parole system its role in the sentencing and correctional process, its operations, and its impact on inmates.

A. The Recent Application of Minimum Due Process Protections to Individuals With Liberty or Property Interests Adversely Affected by Government Action in a Variety of Settings Reflects the Adaptability of the Concept of Due Process to Changing Realities.

Since *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (due process before garnishment of wages), this Court, in an almost unbroken line of cases, has applied the safeguards of the due process clause to a

host of situations where liberty and property interests formerly thought to be exempt from constitutional protection were threatened by unchecked government action. See, *e.g. Goss v. Lopez*, 419 U.S. 565 (1975) (due process before school suspensions); *Taylor v. Hayes*, 418 U.S. 488 (1974) (due process before contempt citation); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (due process may require counsel in probation revocation hearing); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (due process before state-assisted repossession); *Bell v. Burson*, 402 U.S. 535 (1971) (due process before suspension of driver's license); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (due process before public posting of name forbidding individual from purchasing liquor); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process before termination of welfare benefits). Although the content of the prescribed protections has been held to vary from case to case, each recognizes the quintessential value of procedure in our system of government, "for it is procedure that marks much of the difference between rule by law and rule by fiat." *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971). Implicit in these decisions is a respect for the individual adversely affected by important decisions of governmental bodies and a healthy concern over the integrity of the decisionmaking processes employed by the multitude of agencies wielding government power. As one influential commentator has observed in a context directly relevant to this case:

> "A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual no matter how degenerate. It is a radical departure from tradition to accept for a defined class of persons, even criminals, a regime in which their right to liberty is determined by officials

> wholly unaccountable in the exercise of their power and through processes which deprive them of an opportunity to be heard on the matters of fact and policy which are relevant to the decisions made." Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904, 923 (1962).

As the above line of cases evinces, the bulwark of this tradition has been the due process clause, whose "touchstone . . . is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Kent v. United States*, 383 U.S. 541, 554 (1966).

In the administration of correctional justice, the general area of concern in this case, the principles animating the extension of due process in the recent cases of this Court have been solidly rooted. "There is no iron curtain drawn between the Constitution and the prisoners of this country. [T]he position [that] implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause [is] plainly untenable." *Wolff v. McDonnell*, 418 U.S. at 555-56. See also *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). Yet, in spite of these recent developments, one major area thus far has remained immune from this Court's scrutiny: the parole release process, which has been recognized in a recent report of a subcommittee of the House Judiciary Committee 'as the single most inequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map." H.R. Rep.

No. 94-184, 94th Cong., 1st Sess. at 3 (1975). A complete understanding of the contours of the constitutional issues involved first requires a description of the parole release process as viewed by commentators and the courts.

B. The Realities of the Parole Release Process Belie the Position of Non-Intervention Adopted by the Courts Below.

In its memorandum opinion, the District Court refused to lay down minimal due process standards for parole release hearings, claiming that "the nature of this 'practical and troublesome area' demands that the states be left free to develop correctional remedies unhampered by pervasive judicial interference in the mechanics of conditional release." (A. 15). Ironically, the Chairman of the U.S. Board of Parole disputes the District Court's view that minimal judicial intervention will straightjacket the parole system: "Much has been done to improve parole, and I would be the first to say that the courts have been extremely influential in this respect." Sigler, *Abolish Parole?*, 39 Fed. Prob. 42, 48 (June 1975). This expert view is based on the realities of a system that has been carefully scrutinized in recent years.

It is the overwhelming sentiment of careful observers of parole release decisionmaking that parole boards, as they currently function in most jurisdictions, are "one of the last bastions of unchecked and arbitrary power in America." California Assembly's Select Committee on Administration of Justice, *Parole Board Reform in California—Order Out of Chaos* 15 (1970). A respected

federal judge has described the system as one in which "parole officials carry on for the most part the motif of Kafka's nightmares." Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1, 15 (1972). A number of national task forces, study commissions, and observers who have reviewed the performances of parole boards have reached conclusions substantially similar to the one voiced by the subcommittee of the House Judiciary Committee:

> "Everywhere the Subcommittee went they found universal dissatisfaction with the parole process. Wardens claimed that it was a major cause of institutional tension. Inmates felt that they were being treated inequitably. Judges felt that discrepancies within the system made a mockery of the sentencing process." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. at 2 (1975).

See also National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, 389-435 (1973); Citizens' Inquiry on Parole and Criminal Justice, Inc., *Prison Without Walls: Report on New York Parole*, passim (1975); Official Report of the New York State Commission on Attica, *Attica* 93-102 (1972);[9] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 85-86 (1967); D. Stanley, *Prisoners Among*

[9]Compellingly, the Attica Commission pinpointed the parole release procedures followed by the New York State Board of Parole as one of the central causes of inmate frustration and unrest leading to the tragedy at Attica: "[A]s presently operated, parole procedures are unfair, and appear to inmates to be even more inequitable and irrational than they are." *Id.* at xviii.

Us: The Problem of Parole, passim (in press The Brookings Institution, 1976); K. Davis, *Discretionary Justice* 126-41 (1969); F. Cohen, *The Legal Challenge to Corrections* 26-63 (1969); Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 Am. U.L. Rev. 477 (1973); Parsons-Lewis, *Due Process in Parole-Release Decisions*, 60 Calif. L. Rev. 1518 (1972); Bixby, *A New Role for Parole Boards*, 34 Fed. Prob. 24 (June 1970); Tappan, *The Role of Counsel in Parole Matters*, 3 Prac. Law. 21 (February 1957).

Embodied in a *realistic* concept of parole are three relevant elements. First, as the Chairman of the U.S. Board of Parole has noted, "the parole process is inseparable from the sentencing process." Sigler, *Abolish Parole?* 39 Fed. Prob. 42, 47 (June 1975). "[T]oday parole boards and judges are expected to exercise their discretion to determine the proper sentence . . . parole legislation involves essentially a delegation of sentencing power to parole boards. The parole decision involves many of the same kinds of factors that are involved in the original sentencing decision." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 86 (1967). In short, "the function of parole boards at release hearings and of judges at sentencing are virtually identical." Parsons-Lewis, *Due Process in Parole Release Decisions*, 60 Cal. L. Rev. 1518, 1534 (1972).

Second, release on parole is not an exceptional stroke of good fortune, saving a few prisoners from serving their full term. In 1970, 72% of those adult felons who left prison did so on parole. "Parole is the predominant mode of release for prison inmates today, and it is

likely to become even more so." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 389 (1973). In Kentucky, for example, parole accounted for approximately 60% of all releases from adult felony institutions. Kentucky Bureau of Corrections, Office of Statistical Information, *Parole Recommendation and Deferment: A Study of the Kentucky Parole Board's Activities for 1973-74* at 1 (1975). In 1974-75, of 2,676 prisoners appearing before the Kentucky Parole Board, 1,410 were released to parole. Kentucky Bureau of Corrections, Office of Statistical Information, *Parole Board Activities, 1951-74*. The Official Report of the New York State Commission on Attica expressed the truth tersely: "In practice, the Parole Board–not the judge–decides how long an inmate will serve time." *Attica* 93 (1972).

Third, parole release is not "leniency." Studies have shown that "actually prisoners serve as much time in confinement in jurisdictions where parole is widely used as in those where it is not." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 62 (1967). According to a recent survey, the great majority of federal judges consider parole in sentencing and approximately one-half sentence on the assumption that the prisoner will be released after serving one-third of it. Two-thirds of the judges said that they expected sentenced defendants to be released before serving the maximum sentence imposed. Project, *Parole Release Decision Making and the Sentencing Process*, 84 Yale L.J. 810, 882 n.361 (1975) (hereinafter cited as Yale Project).[10]

[10]For a recent statistically documented discussion of the relationship between sentencing and parole, see *United States v. Jenkins*, 403 F.Supp. 407 (D. Conn. 1975).

Thus, "today . . . the legal maximum is not considered the norm. Parole . . . should not be considered any more a matter of grace than any sentence which is less than the maximum provided for by statute." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 86 (1967); see, *e.g.*, *Ky. Rev. Stat.* §439.340 (parole neither an award of clemency nor a pardon).[11]

One additional aspect of parole release decision-making, relied on by the District Court as justification for excluding any of the strictures of minimum due process from the confines of the parole hearing, deserves further attention; *i.e.*, the role of discretion and predictive judgment. As explained by the District Court: " 'The Authority . . . is and must be free to weigh all the tangible and intangible factors which determine whether a particular person is ready to return to society before his maximum term has been served.' " (A. 15). *quoting Dorado v. Kerr*, 454 F.2d 892, 897 (9th Cir. 1972). This notion, that due process would unduly intrude upon the discretionary and predictive judgments made by parole boards, conflicts once again with the operative (as opposed to espoused) factors motivating parole release decisions and with prior decisions of this Court rejecting regimes of unbridled

[11]Parole serves other important state functions. It provides an incentive mechanism assisting in the control of internal prison discipline. It is a control measure for reducing prison populations to constitutionally acceptable levels. And it allows the executive and judicial branches to share–and serve as a check on each other–responsibility for a decision with awesome consequences for the individual. See generally Comment, *The Parole System*, 120 U. Pa. L. Rev. 282 (1971).

discretion exercised under the guise of benevolent expertise.[12]

As recognized by Professor Kadish, the argument that legal rules will only operate to impair the reliability of expert judgment is without proper foundation for five reasons:

(1) The goal of rehabilitation—a main tenet of parole release decisionmaking—is not exclusive in our society. "Reverting to elementary principles for a bit, we ought to recall that individualized justice is *prima facie* at war with such concepts, at least as fundamental, as equality, objectivity, and consistency in the law." M. Frankel, *Criminal Sentences: Law Without Order*, 10 (1973);

(2) Expert judgment contains premises and assumptions that deserve challenge and careful scrutiny;

(3) The decision to release a prisoner is often predicated on reasons unrelated to rehabilitation, *e.g.*, prison overcrowding. See *New York Times*, January 5, 1976, at 1, Col. 2 (city ed.) (at least six southern states are releasing prisoners on parole because of prison overcrowding);

(4) Correctional judgments turn on matters of historical fact (*e.g.*, the nature and number of past

[12]The petitioners acknowledge that the discretion exercised by the Board in parole release decisionmaking differs enough, for constitutional purposes, from the discretion exercised in parole revocation decisionmaking (see *Morrissey v. Brewer*, 408 U.S. at 479-80) to warrant a relaxation of the procedures mandated by *Morrissey* in parole revocation hearings (*e.g.*, confrontation and cross-examination). But, we submit, this distinction is without a difference insofar as the threshold applicability of due process is concerned.

arrests, employment status, etc.), as well as scientific ones; and

(5) Overburdened parole boards, like other government agencies, commit errors. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv.L. Rev. 904, 924-28 (1962).

The prescience of Kadish's observations is revealed in recent actions taken by the U.S. Board of Parole. In an attempt to reduce by its own initiative "the arrant subjectivism of undisciplined and unguided discretion," Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 831, (1961), the Board has promulgated detailed guidelines setting forth normal periods of incarceration for inmates to serve before release "for various combinations of offense . . . and offender . . . characteristics . . . [assuming] good institutional progress." 28 C.F.R. §2.20(b), *as amended*, 40 Fed. Reg. 41333 (1975).[13] The average time to be served is found by measuring the classification given the particular offense—*e.g.*, a minor theft is "low," theft of a single motor vehicle not for resale is "moderate," organized vehicle theft is "high," robbery is "very high"—with the "offender characteristics" as disclosed by the "salient factor score." This score comprises the applicant's parole prognosis as measured by nine factors. The striking fact is that eight of the nine factors relate to the inmate's preincarceration record and behavior. 40 Fed. Reg. 41328, 41337, generally known to the inmate and the sentencing judge at the time of

[13]A copy of the Guidelines, as most recently revised, is annexed to this brief as Appendix B. For a comprehensive analysis of the guidelines, see Yale Project, *passim*.

sentencing; that none of them involve "delicate" or "sensitive" or "confidential" matters; and none involve subtle, complex psychological-medical-criminological evaluations.[14]

Thus, the federal Board's own exercise of discretion has gone far to demystify the parole process, and to put in perspective such descriptions of the parole process as relied on by the District Court here. While parole decisionmaking remains a complex, multi-faceted inquiry not analogous to a typical lawsuit, it is plain that there are matters germane to the decision whose accurate and fair determination can only be maximized through the introduction of due process safeguards into the process. The perceptions given voice by this Court in *Scarpelli* and in *Morrissey* in the probation and parole revocation context are indistinguishable in the context of parole release: "Both the . . . parolee and the State have interests in the accurate finding of fact and the informed use of discretion." *Gagnon v. Scarpelli*, 411 U.S. at 785; "Society thus has an interest in not having parole revoked because of erroneous information . . . and . . . a .further interest in treating the parolee with basic fairness. . . ." *Morrissey v. Brewer*, 408 U.S. at 484.

[14]As listed above, p. , as of April 1, 1975, the Kentucky Parole Board began to employ an unweighted list of factors in reaching its parole release decisions. Similar criteria, 28 C.F.R. §2.19, listed by the U.S. Parole Board, have been described as a "laundry list," P. Hoffman & D. Gottfredson, *Paroling Policy Guidelines: A Matter of Equity* at iv (June 1973) (NCCD Parole Decisionmaking Project Supp. Rep. No. 9) (preface M. Sigler), "in recognition of the limited utility of such an inclusive and unweighted list in structuring discretion and making decisions. Yale Project at 832, n.104.

In juvenile law proceedings, the shield of discretion often invoked by government decisionmakers has been pierced on a number of occasions by this Court in recognition of the fact that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *In re Gault*, 387 U.S. 1, 18 (1967). In *Kent v. United States*, 383 U.S. 541 (1966), the Court first canvassed the realities of the juvenile court system and reached conclusions about the functioning of juvenile court proceedings remarkably relevant to the operations of the present parole system in most states: "While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees. . . ." *Id.* at 555. Again, in *In re Gault*, 387 U.S. 1 (1967), the Court looked past the theoretical justifications for the juvenile court system to its theory in use. It found that:

> "[t]he absence of substantive standards has not necessarily meant that children receive careful compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." *Id.* at 18-19.

Most recently, in *Breed v. Jones*, 421 U.S. 519 (1975), the Court, again recognizing " that there is a gap between the originally benign conception of the system and its realities," *Id.* at 528, rejected an argument substantially similar to the one adopted by the District

Court here: "We do not agree with petitioner that giving respondent the constitutional protection against multiple trials in this context will diminish flexibility and informality to the extent that those qualities relate uniquely to the goals of the juvenile court system." *Id.* at 535.

In the field of juvenile law, as in all other areas of governmental endeavor, a chief vehicle by which our constitutional traditions seek to safeguard the interests of government and the individual is in the flexible concept of due process. As Mr. Justice Frankfurter authoritatively observed in his oft-cited concurring opinion in the *Joint Anti-Fascist* case:

> "That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depends on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of righteousness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951).

C. Parole Release Proceedings Qualify For Due Process Protection Under the Standards Set Forth In *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Wolff v. McDonnell*, 418 U.S. 539 (1974).

In *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Wolff v. McDonnell*, 418 U.S. 539 (1974), the minimum protections guaranteed by the due process

clause were applied, respectively, to parole revocation proceedings and prison disciplinary proceedings involving the potential forfeiture of a prisoner's good time credits. Both cases first analyzed the nature of the liberty interest asserted by the parolee and prisoner. A similar analysis of the individual interests involved in parole release proceedings supports the application of due process to these proceedings. This analysis also has been adopted by the overwhelming majority of cases decided after *Morrissey v. Brewer, supra*, and buttressed by *Wolff v. McDonnell, supra*, reaching the result urged by the petitioners here.

1. The nature of a prisoner's interest in parole release embodies "real substance."

The insight into "the function of parole in the correctional process" with which the Chief Justice began the opinion in *Morrissey* neatly sums up the discussion of the realities of the parole system contained in part B, *supra*, and provides a logical point of departure in analyzing the nature of the prisoner's interest in parole release:

> "During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system.... Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison." 408 U.S. at 477.

As recounted above, pp. 19-20, the expectation of parole release is one that is realized for a very large number of prisoners; that is expected to be so realized by legislators in setting statutory maxima and by judges or juries in setting what, in effect, are partially indeterminate sentences; and that is realized or not by a process that essentially involves a deferred determination of the wisdom of continued incarceration or conditional liberty. It is, in short, "more than an abstract need or desire . . ., more than a unilateral expectation" of release (*Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); it is an expectancy that "has real substance" (*Wolff v. McDonnell*, 418 U.S. at 557; *cf. Goss v. Lopez*, 419 U.S. 565, 576 (1975) (every deprivation which is "not *de minimus*" implicates due process *Perry v. Sindermann*, 408 U.S. 593, 599-601 (1972).

In light of these features of the parole system and the relationship of prisoners to it, it is not controlling that the prisoner is not absolutely entitled to release. As Professor K.C. Davis has explained, "[O]ne who lacks a 'right' to a government gratuity may nevertheless have a 'right' to fair treatment in the distribution of the gratuity." K. Davis, *Administrative Law Text* 177 (3d ed. 1971). In Kentucky, the General Assembly has provided each prisoner (except those serving a sentence of life without parole) with an opportunity for a hearing before the Parole Board prior to the Board's rendering a decision either granting or denying parole. Over sixty percent of the prisoners who go into that hearing are released on parole. The parole hearing and the undeniable release statistics are expectancies "upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408 U.S. at 577. It is therefore within the ambit of interests subject to the protection of procedural due process.

The decision of the District Court implies that, for purposes of the applicability of the due process clause, there is a line of constitutional significance between revocation and release proceedings, between staying in and going back. This distinction, if not weakened by the demise of the right privilege concept, is inconsistent with a number of decisions–decided on a variety of constitutional grounds–in which this Court has clothed individuals seeking to obtain, rather than retain, some governmental benefit with the mantle of due process protections. *Cf., e.g., Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963), *Konigsberg v. State Bar*, 353 U.S. 252 (1957), and *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (admission to the Bar); *Speiser v. Randall*, 357 U.S. 513 (1958) (application for tax exemption); *Simmons v. United States*, 348 U.S. 397 (1955) (application for draft exemption); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926) (application for admission to practice before Board of Tax Appeals). See also *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964) (application for a liquor license). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968). There is, to be sure, a difference between denial of release and revocation, principally with regard to the specificity of the basis for the adverse action. As is argued below, however, this difference warrants a lessened degree of protection, not an absence of protection.

As to the weight of the prisoner's interest, in both release and revocation the question for the future is the

same: incarceration or controlled liberty. The parole release decision, far from being a routine administrative determination, is nothing short of monumental for the prisoner--"a life decision," as one prisoner has put it. Citizens Inquiry on Parole and Criminal Justice, Inc., *Prison Without Walls: Report on New York Parole*, 46 (1975). See also D. Stanley, *Prisoners Among Us: The Problem of Parole*, 25-26 (in press The Brookings Institution, 1976); R. Minton (ed.), *Inside Prison American Style*, 176-93 (1971). While the parolee suffers a different sort of worsening of condition if he or she loses conditional liberty, the question is not which group of persons is worse off, but whether the prisoner's situation is also significantly worsened when release is denied.

2. Since *Morrissey v. Brewer*, and buttressed by *Wolff v. McDonnell*, no court of appeals except the court below has held to the position that due process does not apply to parole release proceedings.

The District Court dismissed the complaint on the ground that the denial of parole does not "wreak a grievous loss of liberty" so as to bring into play the Fourteenth Amendment's guarantee of procedural due process. In so doing, it relied on a number of lower federal court cases, most of which antedated *Morrissey v. Brewer*, 408 U.S. 471 (1972).[15] In *Morrissey*, the

[15]The District Court, for example, relied heavily on the lower court opinion in *Bradford v. Weinstein*, 357 F.Supp. 1127, (E.D.N.C. 1973), which was reversed on appeal. 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 44 U.S.L.W. 3372 (U.S. December 10, 1975). It also alluded to *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970), whose value as precedent against the relief sought here was gravely diminished by a subsequent Second Circuit case similarly authored by Judge Mansfield. *U.S. ex rel. Johnson v. Chairman, N.Y. State Board of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974).

Court recognized that release on parole is not a "privilege" subject to revocation at the will of the state, but, to the contrary, was "an integral part of the penological system." *Id.* at 477. In holding that the "conditional liberty" of the parolee was protected by the due process clause, it rejected the notion "that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion." *Id.* at 483. In sum, *Morrissey* makes clear that, because release on parole provides a qualitatively different way of life from continued incarceration in prison, in any meaningful sense the parole release decision implicates interests in liberty deserving due process protection.

In the wake of *Morrissey*, numerous federal courts have held that due process was applicable to parole release decisions. "Whatever may be said for the decisions which have dealt with this and/or related questions involving due process requirements and the parole application stage, either directly or indirectly, it seems fair to say that the slate has been wiped all but clean by *Morrissey v. Brewer*." *Childs v. U.S. Board of Parole*, 371 F.Supp. 1246, 1246-47 (D.D.C. 1973), *aff'd* 511 F.2d 1270 (D.C. Cir. 1974). Indeed, all Courts of Appeals that have addressed the issue squarely in a reported opinion have held that parole release hearings qualify for due process protection.[16]

[16]In a recent ruling on this issue, the Fifth Circuit accorded no precedential value to *Scarpa v. U.S. Board of Parole*, 477 F.2d 278 (5th Cir.), *remanded for consideration of the question of mootness*, 414 U.S. 809, *vacated as moot*, 501 F.2d 992 (1973), where the due process question was discussed in dictum adversely to the position of the petitioners here. *Ridley v. McCall*, 496 F.2d 213, 214 (5th Cir. 1974).

In *United States ex. rel. Johnson v. Chairman, N.Y. State Board of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974), the Second Circuit, directly facing the same issues presented here, held that the due process clause of the Fourteenth Amendment required the New York State Board of Parole to provide inmates with a quantum of due process protection in parole release hearings. At the threshold, the court distinguished the prior Second Circuit case of *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970), on two grounds: (1) In *Menechino*, the plaintiff primarily had sought the right to counsel and to cross examine witnesses–not the right, for example, to a written statement of reasons upon denial of parole. No consideration, therefore, was given to partial relief; and (2) *Menechino* was decided prior to *Morrissey*, which "rejected the concept that due process might be denied in parole proceedings on the ground that parole was a 'privilege' rather than a 'right'." 500 F.2d at 927.

With parole treated as an interest entitled to due process protection, the court found that:

> "[a] prisoner's interest in prospective parole, or 'conditional entitlement,' must be treated in like fashion. To hold otherwise would be to create a distinction too gossamer-thin to stand close analysis. Whether the immediate issue be release or revocation, the stakes are the same: conditional release versus incarceration." *Id.* at 928.

Strengthening the court's view was the fact that in New York, as in Kentucky, most inmates can expect parole. Therefore, "[f]or him, with such a large stake, the Board's determination represents one of the most critical decisions that can affect his life and liberty." *Id.*

In *Bradford v. Weinstein*, 519 F.2d 728 (4th Cir. 1974), the Fourth Circuit reached the same conclusion as the Second on the question of the applicability of due process protections to parole release proceedings. "We are of the view that plaintiffs' right to consideration for parole eligibility is, at least, an aspect of liberty to which the protection of the due process clause extends." *Id.* at 731. Calling the parole release situation the converse of the in-prison disciplinary situation addressed by the Court in *Wolff v. McDonnell*, 418 U.S. 539 (1974), see discussion, pp. 32-33, *infra*, the Court discerned no distinction in the two circumstances as far as the applicability of due process protection was concerned. "We think it would be a grievous loss for a prisoner by reason of a completely *ex parte* proceeding, and the resulting increased opportunity for committing error, to be denied parole and required to serve more of his term because the attention of the parole board was not called to data tending to indicate that parole should be granted, or for a prisoner whose incarceration has as its ultimate object the prisoner's rehabilitation to fail to know, let alone understand, why parole is denied him and learn what changes in attitudes, habits, and the like will be required if he is ever to be successful in obtaining parole. . . ." *Id.* at 732.

In *Childs v. U.S. Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974), the District of Columbia Circuit joined with the Second and Fourth in holding that "the parole decision must be guided by minimal standards of procedural due process." *Id.* at 1278. Relying on *Morrissey*, *McDonnell* and the distinct trend of recent decisions on this issue, the court ruled that the protection of an individual's interest in liberty from

possible arbitrary governmental deprivation demanded that due process apply to parole release proceedings. Cutting to the heart of the issue, the opinion stated:

> "The deprivations due to revocation of the conditional liberty enjoyed by a parolee demonstrate the serious effects of denial of parole. The applicant is deprived of the valuable features of conditional liberty described by the Court. This seems to us to place the procedures by which this deprivation is accomplished under a standard of due process. The Board holds the key to the lock of the prison. It possesses the power to grant or deny conditional liberty. In the exercise of its broad discretion, it makes judgments concerning the readiness of an inmate to conduct himself in a manner compatible with the well being of the community and himself, If the Board's decision is negative, the prisoner is deprived of conditional liberty. The result of the Board's exercise of its discretion is that an applicant either suffers a "grievous loss" or gains a conditional liberty. His interest accordingly is substantial." *Id.*

This reasoning rests on a true perspective of the relationship of the prisoner to the parole and sentencing process and, we submit, should be ratified by this Court.[17]

A final decision of this Court, we believe, clinches the question of applicability. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court held that the demands

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[17]The decisions of other circuits that have addressed the issue, although reaching similar results on statutory grounds, are informed by strong due process overtones. See *Mower v. Britton*, 504 F.2d 396 (10th Cir. 1974); *King v. United States*, 492 F.2d 1337 (7th Cir. 1974) Cf. *Fischer v. Cahill*, 474 F.2d 991 (3rd Cir. 1973). In *United States ex rel. Richerson v. Wolff*, No. 75-1241 (7th Cir. Nov. 20, 1975), the Seventh Circuit held four-square that due process applies to parole release proceedings.

of procedural due process applied to prison disciplinary proceedings involving the removal of a prisoner's good time credits. *McDonnell* makes clear that while the state is not required to provide for early release through good time credits or other means, once it has done so, it has created an important interest to which the guarantees of procedural due process attach. The Court stated:

> "It is true that the Constitution itself does not guarantee good time credit for satisfactory behavior while in prison.... But the state having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state created right is not arbitrarily abrogated." *Id.* at 557.

The same observations may be made with respect to parole, a statutorily created alternative to incarceration. As was noted in *McDonnell*: "We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state. The touchstone of due process is protection of the individual against arbitrary action of government." *Id.* at 558. It cannot be disputed that the government can act just as arbitrarily when it denies a prisoner release on parole as it can when it denies good time credit or revokes parole. If there was any doubt as to the applicability of procedural due process to parole release proceedings after *Morrissey*, that doubt has surely been dispelled by

McDonnell.[18] It would be paradoxical, indeed, in any system with a reasonable hierarchy of values, if the parole release decision escaped constitutional limitation while other actions of government–*e.g.*, the forfeiture of good time in *McDonnell*; the stigma imposed in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), or the short suspension from school in *Goss v. Lopez*, 419 U.S. 565 (1975)– are required to abide by constitutional requirements.

[18]In discussing the content of the safeguards required by prison disciplinary hearings, the Court in *McDonnell* implicitly recognized that deprivation of good time credit, which, it perceived, seriously affected the condition of a prisoner's liberty, is a lesser harm than the denial of parole. 418 U.S. 560-61.

II.

DUE PROCESS SAFEGUARDS SHOULD BE REQUIRED IN PAROLE RELEASE PROCEEDINGS DESIGNED, AT A MINIMUM, TO AFFORD PAROLE APPLICANTS: (1) A MEANINGFUL OPPORTUNITY TO BE HEARD AND TO KNOW AND REBUT FACTUAL INFORMATION UPON WHICH AN ADVERSE DECISION MAY BE PREDICATED; (2) THE RIGHT, UNDER PRESCRIBED CIRCUMSTANCES, TO BE ASSISTED BY AN ADVOCATE; AND (3) THE RIGHT TO A WRITTEN STATEMENT SPECIFYING, WITH EVIDENTIARY AND FACTUAL SUPPORT, THE REASONS FOR DENIAL.

A. It May Be Appropriate For the Court to Remand This Case For An Evidentiary Hearing Without Specifying What Process Is Due.

Once it is determined that parole release proceedings qualify for due process protection, "the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. at 481. The District Court considered this question by citing, with apparent approval, a number of pre-*Morrissey* cases that had rejected, as being constitutionally required, certain procedures listed in the memorandum opinion (A. 15). Having held that due process is totally inapplicable to parole release proceedings, it was, we submit, inappropriate for the District Court to reach this question, particularly without the benefit of an evidentiary hearing to ascertain the practices and procedures currently employed by the Kentucky Parole Board and the parties' respective

"interests in preserving the practice and procedures currently followed." *Bradford v. Weinstein, supra,* 519 F.2d at 733 (case remanded to District Court for evidentiary hearing on required procedures). Because of the bare state of the record here, this Court may deem it appropriate, after ruling on the threshold applicability of due process to parole release proceedings, to go no further and to remand the case to the District Court for the development of a record upon which the content of the required procedures may sharply be forged. This procedure was utilized by the Fifth Circuit in *Ridley v. McCall,* 496 F.2d 213 (5th Cir. 1974), where a procedural challenge to parole board procedures was remanded for "development of the actual facts, not just the pleaded contentions of the parties." *Id.* at 214; see *Childs v. U.S. Board of Parole,* 511 F.2d 1270, 1286 (D.C. Cir. 1974) (Leventhal, J., concurring); Amsterdam, *Perspectives On the Fourth Amendment,* 58 Minn. L. Rev. 349, 420 (1974).

The Court may be reluctant, however, to leave the matter so wholly unresolved. *First,* the action of the District Court in rejecting point by point all procedures should, perhaps, be rectified. *Second,* the issue of what process is due in parole release proceedings is being litigated in a number of cases around the country. *E.g., Franklin v. Shields,* 399 F.Supp. 309 (W.D. Va. 1975), *cert. before judgment denied,* 44 U.S.L.W. 3356 (U.S. Dec. 12, 1975). *Third,* in prior cases raising analogous due process claims, the Court has been willing to specify with considerable particularity the minimum procedures required by due process. See, *e.g., Gerstein v. Pugh,* 420 U.S. 103 (1975); *Wolff v. McDonnell, supra; Morrissey v. Brewer, supra.* For these reasons, and also because the Court may find resolution of the

threshold question less abstract if the content of the required procedures is addressed by counsel as well, this section will present petitioners' contentions as to what this "particular situation demands." *Morrissey v. Brewer,* 408 U.S. at 481.[19]

If these questions are reached, however, it is essential to bear in mind the evolving state of present knowledge about parole procedures and the realities of the parole process. As the current chairman of the U.S. Board of Parole recently observed, for many years parole "was a world of its own, sealed off from public scrutiny." Sigler, *Abolish Parole?* 39 Fed. Prob. 42, 43 (June 1975). For purposes of this case, the allegations of the complaint must be taken as an essentially true description of the operation of parole release process in Kentucky.[20] In fashioning the procedures submitted below, the petitioners have attempted to rely on the realities of the parole system as revealed by published materials. Ultimately, however, an evidentiary hearing will be necessary if matters of fact or practice, contrary

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[19]In *Gagnon v. Scarpelli, supra,* the Court took an intermediate approach between refusing to specify particular procedures and delineating with particularity the required minimum. There, the probationer's request for a *Morrissey*-type requirement that counsel be permitted at all probation revocation hearings was rejected for a case-by-case approach. Similarly, in *Morrissey v. Brewer, supra,* the Court, while spelling out a number of minimum requirements, reserved for future determination the question whether retained or appointed counsel was required, a question resolved in *Gagnon v. Scarpelli, supra.*

[20]This description is substantially corroborated in V. O'Leary and J. Nuffield, *The Organization of Parole Systems in the United States,* 54-55 (1972).

to those asserted by the petitioners, are thought to be dispositive in this phase of the due process inquiry.[21]

B. The Minimum Procedural Safeguards Submitted By the Petitioners Reflect An Accommodation Between the Severity of the Loss Suffered By A Rejected Parole Applicant, The Interests of The Parole Board in Summary Action, and The Functional Appropriateness of the Requested Procedures.

"Once it is determined that due process applies, the question remains what process is due. . . . '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action.' *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 880, 895 (1961)." *Morrissey v. Brewer*, 408 U.S. at 481. Three factors have been identified to weigh most heavily in the balancing process the Court has employed in specifying the procedures dictated by due process: "The severity of loss which the individual suffers as a result of governmental deprivation of a protected liberty or property interest, the weight of governmental interests justifying summary action and the functional

[21]The embryonic state of present knowledge about the world of parole counsels that the Court should make clear, as it did in *Wolff v. McDonnell*, 418 U.S. at 572, that whatever procedures are required are "not graven in stone" and are subject to augmentation should emerging proof regarding the competing interests of the parole applicant and the parole board and the utility of whatever procedures are required so demand.

appropriateness of the requested procedures for resolving the particular type of dispute in question." Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. 1510, 1514 (1975). Compare *Bell v. Burson*, 402 U.S. 535, 540 (1971), with *Goldberg v. Kelly*, 397 U.S. 254, 262-63, 267 (1970). with *Gagnon v. Scarpelli, supra.* 411 U.S. at 788-91. As more fully advanced below, petitioners contend that the interests of the Board in the efficient administration of the parole process, in not denying or granting release on the basis of inaccurate or incomplete information, and in the fair treatment of its constituency so as to "enhance the changes of rehabilitation by avoiding reactions to arbitrariness," *Morrissey v. Brewer*, 408 U.S. at 484, when balanced with the interest of the prisoner in release, militate in favor of the appropriateness of the procedures detailed by petitioners below.

It is generally accepted that two main goals of a parole board are accurately predicting the risk a prisoner will pose to society and the readiness of the community to accept the prisoner back in its fold. To meet these goals on an individual basis the Kentucky Parole Board reviews an applicant's prison record, the nature and severity of the crime, the sundry contents of the file, which can contain unsolicited comments about the appliicant from the community, and conducts a brief hearing–often lasting only minutes–during which the applicant can orally advocate his cause. Immediately following the applicant's brief presentation, he or she is asked to leave the room, and the Board proceeds to make its decision. Upon reaching a decision, the Board calls the prisoner back into the hearing room and

announces its decision. Deliberation by the Board often lasts only minutes.

Given this decisionmaking process, there exist no compelling reasons why the Board—like all other administrative agencies—should be immunized from due process protections. On the contrary, the application of the safeguards urged by the petitioners would inject basic elements of fairness and rationality into an otherwise closed system, while not appreciably impinging on the necessary degree of discretion exercised by the Board in its decisionmaking process. See *Morrissey v. Brewer*, 408 U.S. at 471. In short, "[b]oth the . . . [prospective] parolee and the state have interests in the accurate finding of fact and the informed use of discretion—the [prospective] parolee to insure that his liberty is not unjustifiably taken away and the state to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community." *Gagnon v. Scarpelli*, 411 U.S. at 785.

The primary interest that the Board legitimately can assert in opposition to the suggested procedures is the increased administrative burden that may result. This Court, however, has quickly put such contentions in their proper perspective. In *Breed v. Jones*, 421 U.S. 519 (1975), for example, the Court readily acknowledged "that the flexibility and informality of juvenile proceedings are diminished by the application of due process standards," but replied: "Due process standards inevitably produce such an effect, but that tells us no more than that the Constitution imposes burdens on the functioning of government and especially of law enforcement institutions." *Id.* at 535 n.15. Again, in *Gagnon v. Scarpelli, supra*, the Court recognized that

"[s]ome amount of disruption inevitably attends any new constitutional ruling." 411 U.S. at 782 n.5; *cf. Taylor v. Hayes*, 418 U.S. 488, 500 (1974) (A simple factual hearing will not interfere with the exercise of discretion). In response to similar arguments portending the impaired efficiency of governmental functioning, the Court has reiterated on a number of occasions that "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); see *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *Bell v. Burson*, 402 U.S. 535, 540-41 (1971). Parole boards are not unique among government agencies in their interest in "speedy resolution" of cases, in "dealing with [applicants] informally," and in managing "very burdensome caseloads," *Goldberg v. Kelly*, 397 U.S. 254 267 (1970), yet this Court has managed, in the correctional field and elsewhere, to accommodate legitimate state interests in articulating the content of due process protection.

Backed by the above discussion, it is appropriate to spell out the precise nature of the safeguards petitioners contend are minimally mandated by due process, cognizant "that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer*, 408 U.S. at 481. Petitioners do not argue that the full range of procedures suggested by *Morrissey v. Brewer, supra, Gagnon v. Scarpelli, supra* or even *Wolff v. McDonnell, supra*, must be applied in all parole release proceedings. Rather, weighing the interests involved, petitioners submit that it is necessary to select only those due process safeguards designed to insure the prisoner a *meaningful* opportunity to be heard and to know and rebut factual information upon which an adverse decision may be predicated; to apprise

the applicant of the reasons for an adverse decision and their evidentiary and factual support; and to preclude the vast possibilities of arbitrary decisionmaking by the Board. To achieve these essential ends, petitioners urge that the following procedures be adopted by the Court as the bare constitutional minima in parole release proceedings:

(1) The right to adequate notice of, and reasonable access to, factual information upon which an adverse decision may be predicated; except, in cases where law enforcement proceedings or investigation will be interfered with, personal safety is unduly jeopardized, or a clearly unwarranted invasion of privacy will result, narrowly drawn exceptions may be propounded to control access to the particular material. In such a case, a summary, which adequately apprises the prisoner of the nature and tenor of the factors that might lead to an adverse decision, may be used.

(2) At the time of each parole review, the right to appear in person for a reasonable period of time before the Board, a panel of the Board, or a Board member or hearing examiner; to submit supporting written material in advance of the hearing for inclusion in the file made available to the person conducting the hearing, and to rebut information or recommendations that may prompt a denial or postponement of parole.

(3) The right to the assistance of an advocate—either a lawyer, a law student, another inmate, a family member, a friend, or a member of the correctional staff—throughout the proceedings. This right should include an opportunity for the advocate to have access to, and consult with the prisoner about, the material referred to in paragraph (1) above. The role of counsel can be structured so as to limit participation both as to time and manner.

(4) The right to a written statement specifying, with evidentiary and factual support, the reasons for denial and, when feasible, the conditions, which if fulfilled, would likely result in favorable parole consideration at a specified future date. Although reducing the degree of procedural protection this Court has required in the correctional field in the past, *e.g., Morrissey v. Brewer, supra,* these safeguards draw sustenance from the new requirements recently laid down by the U.S. Board of Parole, 28 C.F.R. § 2.13(a), *as amended,* 40 Fed. Reg. 41332 (Sept. 5, 1975) (effective October 6, 1975), which are virtually identical in most material respects.[22] See generally Administrative Conference Recommendations 72-3, 25 Ad. L. Rev. 531 (1973).

1. Except in narrowly circumscribed cases, the prisoner should be afforded adequate notice of, and reasonable access to, factual information upon which an adverse decision might be predicated.

The opportunity to know and meet the case against a person whose vital interests are at stake is at the heart of due process protection. See, *e.g., Goldberg v. Kelly,* 397 U.S. at 269-71. In order to permit the parole applicant a reasonable opportunity to marshall facts in his or her defense, to clarify the nature of adverse information, to present evidence in his or her own behalf, and to rebut unfounded charges, either directly or with mitigating circumstances, see *Morrissey v. Brewer,* 408 U.S. at 488, a parole applicant must be

[22] A copy of the parts of these regulations pertinent to this discussion are contained in Appendix to this Brief as Exhibit C.

specifically apprised of, and afforded reasonable access to, the information the Board is considering that may prompt an adverse decision. If, for example, the Board is considering an adverse letter from a member of the community, as was pleaded in the complaint by the deceased plaintiff Bell (para. 11, A. 5), the applicant should be informed of this fact and be allowed sufficient time to develop evidence rebutting the charges. See *In re Gault*, 387 U.S. 1, 33-34, and n.54 (1967).

On one other occasion, this Court has adverted to the danger of factually erroneous or misleading information affecting prisoner interests in parole decisions. *Wolff v. McDonnell*, 418 U.S. at 565.[23] Corroborating this perception and the allegations in the complaint that "there is no organized way in which information is excluded or included in the file, organized in the file, or tested for relevancy, accuracy, reliability, bias, or prejudice" (para. 7, A. 4) are the recorded experiences of judges, scholars, and observers of the parole process. "Everybody . . . who is closely connected with the processing of offenders knows that the recording of information is not treated with any great respect." D. Gottfredson *et al., Parole Decision*

[23]A cognate concern was expressed in *Goss v. Lopez, supra:* "The concern [over unwarranted suspensions] would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. This risk of error is not at all trivial. . . ." 419 U.S. at 579-80.

Making, 49 (Nat'l Council on Crime & Delinq. 1973); *cf. Franklin v. Shields*, 399 F. Supp. 309, 313 (W.D. Va. 1975) (finding of fact that Virginia Parole Board relies on factually erroneous information never verified by the Board); *Kohlman v. Norton*, 380 F. Supp. 1073 (D. Conn. 1974) (parole denied because file erroneously indicated that applicant had used gun in committing robbery); *Leonard v. Mississippi State Probation and Parole Board*, 373 F. Supp. 699 (D. Miss. 1974) (prisoner denied parole on the basis of illegal disciplinary action); *Masiello v. Norton*, 364 F. Supp. 1133 (D. Conn. 1973) (unsupported hearsay allegation, that petitioner would ally with father if released, insufficient basis for parole denial); *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975) (file material, later proven in error, led parole officers to believe that prisoner, a nonviolent sex offender, had violent tendencies. 14 Cal. 3d at 648 n.14; parole evaluation asserted that "family rejects him," when in fact prisoner had a home and employment in family business waiting for him. *Id.* at 651 n.16); *State v. Pohlabel*, 61 *N.J. Super.* 242, 160 A.2d 647 (1960) (presentence report erroneously stated, among other errors, that prisoner was under a life sentence in another jurisdiction); A. Bruce, A. Harno, E. Burgess, J. Landesco, *The Workings of the Indeterminate-Sentence Law and the Parole System in Illinois* 77 (1928) (parole board files inconsistent, ambiguous, and incomplete); D. Dressler, *Practice and Theory of Probation and Parole* 115-16 (2d ed. 1969) (files often contain incomplete and erroneous information); Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature, 88, 91 (1974) (denial of parole, because of failure to utilize educational

programs, by board member unaware that no such programs then existed at unit which prisoner was assigned; misleading effect of vague and conclusory characterization of disciplinary violations); Final Report of the Joint Committee on Prison Reform of the Texas Legislature 89 (1974) ("[T]he Board has denied parole for reasons later discovered to be unfounded that might have been corrected if the inmate had had access to his files"); Hearings Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 2d. Sess. at 451 (1972) (testimony of Dr. Willard Gaylin) ("I have seen black men listed as white and Harvard graduates listed with borderline IQ's."); *Yale Project* at 834 n.107 (erroneous listing of a prisoner's brother's conviction as his).

The Board, the prisoner, and society all have a common interest in the accurate gathering of fact upon which the parole decision is based; disclosure can only further that interest. "Parole boards have as much stake in the accuracy of records as other criminal justice officials. Evidence indicates that decisions are much more likely to be documented carefully and fully when information is disclosed and when those whose interests are at stake have a chance to examine and test it." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 403 (1973).

While full and fair disclosure should be the norm,[24] petitioners recognize that there may be circumstances

[24]The National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 403 (1973), concluded that "in the average parole file little material is so sensitive that it cannot be reviewed with the inmate." Likewise, the consultant to the Administrative Conference in its study of federal parole procedures found that "most files do not seem to contain information that should not be disclosed." Johnson, *Federal Parole Procedures*, 25 Ad. L. Rev. 459, 489 (1973).

where sensitive material should not be disclosed to the prisoner. In such a case, petitioners would support narrowly drawn exceptions along the lines recently adopted by the U.S. Board of Parole in its new regulations, 28 C.F.R. § 2.57(a), *as amended*, 40 Fed. Reg. 41342 (Sept. 5, 1975).[25] These regulations permit a prisoner to review his or her file except where disclosure would jeopardize personal safety, interfere with law enforcement proceedings or investigative techniques, or constitute a clearly unwarranted invasion of personal privacy. These exceptions, designed to insure that "other important state interests" are not threatened, *Wolff v. McDonnell*, 418 U.S. at 561, should comfortably accommodate the competing interests involved.

In a case where disclosure is withheld as falling within one of the exceptions, the prisoner should be sufficiently apprised by way of a summary of the nature and tenor of the factors that might lead to an adverse decision. This summary should be as sufficiently concrete and factual as possible in order to inform the prisoner, within the bounds of the exceptions, of matters relevant to the consideration and to alert the prisoner to possible errors or misinterpretation of data. In the analogous area of applications for conscientious objector status under the selective service laws, this Court, emphasizing the need to balance conflicting interests, has required a fair summary to be supplied the applicant:

> "We did not view this provision for a fair summary as a matter of grace within the Department's discretion, but rather as an essential elelemt in the

[25]Cf. The Privacy Act of 1974, 5 U.S.C.A. §552a (j)(2).

processing of conscientious objector claims. *United States v. Nugent* [346 U.S. 1 (1953)] represented a balancing between the demands of an effective system for mobilizing the nation's manpower in time of crisis and the demands of fairness toward the individual registrant. We permitted the FBI report to remain secret because we were of the view that other safeguards in the proceeding, particularly the furnishings of a fair resume maintained the basic elements of fair play. If the balance struck in *Nugent*, is to be preserved, the registrant must receive the fair summary to which he is entitled." *Simmons v. United States*, 348 U.S. 397, 403 (1955).

If the law in an area involving as weighty a governmental interest as the mobilization of our army in wartime gives such substantial scope to due process concerns, there appears little reason why a similar or even broader scope should not obtain in this case.

2. The parole applicant is entitled to a meaningful opportunity to be heard and to rebut factual information upon which an adverse decision might be predicated.

In order for the parole applicant's right to notice and access to have substance, a meaningful hearing, allowing the applicant an opportunity to rebut unfounded or unfair material, both in advance of an at the hearing, must be held. This right is recognized in forty-five jurisdictions, including Kentucky, which grant an opportunity to be heard in person to all prisoners whose suitability for parole is being reviewed. O'Leary & Nuffield, *A National Survey of Parole Decisionmaking*, 19 Crime & Delinq. 378, 384 (1973). "Authorities on parole procedures regard well conducted hearings as vital to effective decisionmaking, in terms of expanding the information available to the board as well as to their effect on offenders." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* (1967). See also R. Dawson, *Sentencing* 253 (1969).

This Court should make clear, moreover, that a hearing in conformity with due process must be more than the *pro forma* ritual that occurs in many jurisdictions. In Kentucky, for example, it is reported that the Board hears approximately forty cases a day. V. O'Leary & J. Nuffield, *The Organization of Parole Systems in the United States*, 55 (1972). In a normal working day, this averages out to about seven or eight minutes per hearing, including deliberation, a dubiously adequate time period for the Board to canvass the multitude of factors the Board claims to consider in its decisionmaking.[26] Although it would be unwise to fix a

[26] A national survey of parole practices reports that in only 11 jurisdictions are less than 20 cases heard in a day; in 25, more than 30 are heard, and, in 11, 40 or more. O'Leary & Nuffield, *A National Survey of Parole Decisionmaking*, 19 Crime & Delinq. 385 (1973); cf. *In re Sturm*, 11 Cal. 3d 258, 262, 521 P.2d 97, 99, 113 Cal. Rptr. 361, 363 (1974) ("generally . . . no more than 10 minutes"); Official Report of the New York State Special Commission on Attica, *Attica* 96 (1972) ("average time of the hearing, including [reading the file and deliberation] is 5.9 minutes"); Citizens Inquiry on Parole and Criminal Justice, Inc., *Prison Without Walls*, 49 (1975) (in New York, "the majority take between six and twelve minutes"); Hearings Before Subcommittee No. 3 of the House Judiciary Committee on H.R. 13118, 92d Cong., 2d Sess. at 451 (1972) (average time before U.S. Board was 5 minutes); Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 Wash. U. L. Q. 243, 301 (in Kansas hearings are "two or three minutes each"); Yale Project at 821 n.48 (hearings in prior federal practice were "10 or 15" minutes). For a careful analysis supporting these observations, see D. Stanley, *Prisoners Among Us: The Problems of Parole*, Ch. 3 at 18-20 (in press, Brookings Institution 1976).

minimum time for parole release hearing, it is important for the Court to impress on parole boards that, for the hearing to be constitutionally adequate, it must be held "in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545 (1965). The essential need is to recognize that the burden of processing cases shouldered by the Board must be tempered by the prisoner's constitutional right to a meaningful hearing. If this change means a modification in the hearing practices of the Board (*e.g.*, use of hearing examiners) it will not be the first time that constitutional imperatives have affected—and ultimately benefitted—decisionmaking processes. *E.g.*, *Morrissey v. Brewer, supra.*

A further integral component of the right to a meaningful hearing is the right to rebut adverse factual evidence and present favorable evidence in one's behalf. Under the present system in Kentucky (Complaint, paras. 7 & 8, A. 4), a parole applicant's only real opportunity to present evidence in his or her own behalf comes at the very brief hearing before the Board. By the time the hearing is held, the Board presumably has reviewed the applicant's file, and, given the quickness in which a final decision is currently made following the hearing, it is likely that the Board already has tentatively made its decision. This dynamic renders the present hearing relatively useless for the prisoner, whose oral presentation would have to be nothing short of powerful to alter the tentatively reached decision of the Board.

In recognition of the imperative that "[o]rdinarily, the right to present evidence is basic to a fair hearing," *Wolff v. McDonnell*, 418 U.S. at 566, a procedure insuring that the applicant's position be taken into account by the Board at a meaningful time must be devised if the right to present evidence is to be

anything but illusory. Plaintiffs submit that due process requires that the prisoner be entitled to sufficient time in advance of the hearing to introduce whatever evidence into the file he or she deems appropriate. This procedure would allow the Board to consider this evidence in advance of the hearing rather than at the hearing as is normally the case now.

In those cases where adverse material being considered by the Board is rebutted by plausible evidence submitted by the applicant, due process should permit the applicant to present live testimony at the parole hearing. This is the practice in seventeen jurisdictions, O'Leary & Nuffield, *A National Survey of Parole Decisionmaking*, 19 Crime & Delinq. 378, 380 (1973), and is the recommendation of the President's Task Force on Corrections. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 86 (1967). Recent studies indicate, moreover, that live presentations at parole hearings by persons other than the prisoner (whether witnesses or representatives) are helpful to parole examiners and prisoners alike. See Beck, *Effect of Representation at Parole Hearings*, 2, 12-14 (U.S. Bd. of Parole Research Unit 1974). Petitioners do not urge that this right be unqualified. If the Board should determine that live testimony by witnesses would be only marginally relevant or would be "unduly hazardous to institutional safety or correctional goals," *Wolff v. McDonnell*, 418 U.S. at 566, this safeguard can be refused, with the necessary requirement that the Board state in writing its reasons for so refusing. *Cf. Gagnon v. Scarpelli*, 411 U.S. at 791.

3. Parole applicants should have the right to be assisted by an advocate throughout the proceedings.

It is a *non sequitur* to assert that, because parole determinations are more the application of discretion than of law, prisoners have no need for an advocate in assisting them in the process. *Cf. Mempa v. Rhay*, 389 U.S 128, 135 (1967). Former Federal Prisoners Director James V. Bennett made the point well:

> "Of course the purpose of the parole hearing is not to retry the case in the technical sense of the term, and not to argue points of law and matters of that kind. Therefore, for that purpose, counsel is not needed.
>
> But on the other hand, many . . . who have come before the Parole Board are tongue-tied: they are not able to present their views in a logical straightforward manner. Many . . . are ignorant, and they just cannot say anything much in their own behalf. Therefore, it would be helpful if they did have the aid of some individual . . ." American Law Institute, *Proceedings of the 33rd Annual Meeting* 262 (1956).

These views were echoed by Paul W. Tappan, an equally respected penologist with many years of experience in a

state system, whose perceptive views are set forth in the margin.[27]

Indeed, this Court has noted the sad fact that "penitentiaries include among their inmates a high percentage of persons who are totally and functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." *Johnson v. Avery*, 393 U.S. 483, 487 (1969). Other commentators, advocating

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[27] "[P]risoners often need counsel because of their own inadequacies. Many are of less than normal intelligence. Most of them approach parole hearings partially paralyzed by fear and anxiety. Few are able to express themselves fully and effectively, sometimes because of language difficulties. Certainly there is little or no relationship between the offender's ability to make a favorable impression and his actual readiness for release.

Prisoners are generally quite ineffectual in organizing the information they should put to a parole board, important as the hearing is to them, and they have little talent for arguing to the board. To put it simply, they lack those qualities that are important to their success: qualities that are the peculiar strength of the effective advocate. For these reasons the counsel of an attorney may be quite invaluable in preparing and presenting a case to the board . . . . More specifically, it is important that there be presented effectively to the paroling authority the positive aspects of an offender's case that are relevant to his parole, matters that may be quite inadequately elucidated in the institution's records and unknown to the board, and matters in particular that the offender could not easily himself present. For example, the writer, as a parole board member, has had brought more effectively to his attention by counsel than by most parole candidates, details relating to the prisoner's family and his relationships in the home, the quality of community feeling toward the offender, the victim's attitude, and other matters." Tappan, *The Role of Counsel in Parole Matters*, 3 Prac. Law. 26-27 (Feb. 1957).

a role for counsel in parole release hearings, have pointed to the difficulties prisoners have in obtaining pertinent information only reliably available outside the prison walls. The respondents, for example, in considering such factors as "prior employment history," "attitude toward authority: Before incarceration," and "official and community attitudes toward accepting inmate back in the county of conviction," must rely on its own scarce resources in compiling this information. Counsel or counsel-substitute, often with unique access to such material, would not only aid the inmate but also the Board in compiling a complete and accurate decisional record. Another salutary role counsel might play is in insuring that purely arbitrary or biased decisions are prevented. See general, Jacob & Sharma, *Justice After Trial: Prisoners' Need For Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 493, 550-57 (1970).

In recognition of these considerations, over twenty jurisdictions allow counsel to appear at parole release hearings, O'Leary & Nuffield, *A National Survey of Parole Decisionmaking*, 19 Crime & Delinq. 378, 386 (1973) and, by structuring the role of counsel, have

presumably found ways to guard against the remote possibility of abuse.[28] The U.S. Board of Parole, for example, has promulgated the following regulation:

> "Prisoners may be represented in hearings by a person of their choise. The function of a prisoner's representative will be to offer a statement at the conclusion of the interview of the prisoner by the

[28] "[A]llowing retained counsel at a parole release hearing does not mean that he should be allowed to convert it into a trial any more than counsel could achieve such a result at a sentencing in court." *Menechino v. Oswald*, 430 F.2d 403, 416 (2d Cir. 1970) (Feinberg, J., dissenting). In *Gagnon v. Scarpelli*, *supra*, 411 U.S. at 788, the Court raised the spectre that, due to the introduction of lawyers into probation revocation hearings, "the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate rather than continue nonpunitive rehabilitation." It is also predicted that the decisionmaking process inevitably will be prolonged. The petitioners do not minimize these concerns, and, as suggested in the text, believe a mutually satisfactory accommodation of the competing interests involved can readily be reached. We side, however, with the reasoned analysis in Professor Kadish's pathbreaking article: "In virtually all cases . . . the [parole] judgment turns upon the weightiness of considerations of retribution, moral reprobation, and community reassurance as to which in no realistic sense is there called into play the expert professional judgment of the decider. The very subjectivism of this type of judgment would appear to make altogether useful the kind of search into basic values and into their application in the circumstances of the offender toward which able counsel might readily contribute." In response to concern over counsel prolonging the process, he states: "The problems of overburdened parole boards would appear remediable by measures directed to the problem rather than by the pursuit of measures which render the work of the boards less just and adequate." Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 830 837 (1961).

> examiner panel, and to provide such additional information as the examiner may request . . . The presiding hearing examiner shall limit or exclude any irrelevant or repetitious statement." 28 C.F.R. § 2.12.

Such a "mutual accommodation" would appear to further the interests of all involved.[29]

Because "the unskilled or uneducated . . . parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining . . . of witnesses or the offering of dissecting of complex documentary evidence," *Gagnon v. Scarpelli*, 411 U.S. at 787, petitioners urge that the prospective parolee be accorded the right to be assisted by either retained counsel or chosen counsel-substitute throughout the parole release proceeding.[30] This right would comprehend access to counsel or counsel-substitute in preparing for the hearing and live representation at the hearing, with the Board free to

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[29]Commentators have suggested that it is desirable for counsel to play a greater role in release hearings. See Yale Project at 862; Administrative Conference Recommendations 72-3: *Procedures of the United States Parole Board*, 25 Ad. L. Rev. 531, 534 (1973); Comment, *Curbing Abuse in the Decision to Grant or Deny Parole*, 8 Harv. Civ. Rights-Civ. Lib. L. Rev. 419, 449-54 (1973); Comment, *Due Process: Right to Counsel in Parole Release Hearings*, 54 Iowa L. Rev. 497, 502-05 (1968).

[30]Prisoner advocates might come from a law school, a legal services program, correctional staff members, or other inmates. Cf. *Wolff v. McDonnell*, 418 U.S. at 570; cf. *Argersinger v. Hamlin*, 407 U.S. 25, 40-41 (1972) (Brennan, J., concurring). Until a more concrete factual record is available, petitioners do not urge that the right to an appointed representative be reached by the Court in this case.

structure the role of counsel–but not out of existence, *Cf. Kent v. United States*, 383 U.S. 541, 561 (1966) (These rights are meaningless–an illusion, a mockery–unless counsel is given an opportunity to function.")

4. The rejected parole applicant should have a right to a written statement specifying, with evidentiary and factual support, the reasons for denial.

Perhaps the most important due process protection lacking in Kentucky's current parole release scheme is the requirement of a written statement specifying, with evidentiary and factual support, the reasons for denial and outlining, when feasible, the conditions or requirements that must be fulfilled for the applicant to be afforded favorable parole consideration (Complaint, paras. 9 & 10, A. 5). Under the present system, a parole applicant is often left in the dark as to the specific reasons for the denial of parole and is unable to conform his or her behavior to any conditions that

might reasonably assure parole at a future date.[31] For the following reasons, the consequences of permitting the Board to exercise its presently vast discretion in reaching its ultimate decision without the anchor of written reasons are severe both for the applicant and the Board.

First, without a requirement of written reasons, there is no guarantee that the Board did not rely on illegitimate factors or unfounded or unsubstantiated factual conclusions in reaching its ultimate conclusion. *Cf. Wolff v. McDonnell*, 418 U.S. at 565. Given the number and complexity of factors often considered by

[31]As of 1972, 40 jurisdictions did not maintain a written record of the reasons for denial. O'Leary & Nuffield, *A National Survey of Parole Decisionmaking*, 19 Crime & Delinq. 378, 387 (1973). There has probably been substantial change since then, as a result of legislative, administrative, and judicial action. *E.g.*, Ch. 131, Laws of New York, 1975 §1 (1975 McKinney's Session Law News 180) N.Y. Correction Law §214 (6); *Ill. Ann. Stat.* §38-1003-3-5; 28 C.F.R. §213(d); *Childs v. U.S. Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974) *aff'd.* 371 F.Supp. 1246 (D.D.C. 1973); *U.S. ex rel. Johnson v. Chairman, N.Y. Board of Parole*, 500 F.2d 925 (2d Cir. 1974), *aff'd.* 363 F.Supp. 416 (E.D.N.Y. 1973), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974); *Mower v. Britton*, 504 F.2d 396 (10th Cir. 1974); *King v. United States*, 492 F.2d 1337 (7th Cir. 1974); *Billiteri v. U.S. Board of Parole*, 391 F.Supp. 260 (W.D.N.Y. 1975) and 385 F.Supp. 1217 (W.D.N.Y. 1974); *Cooley v. Sigler*, 381 F.Supp. 441 (D. Minn. 1974); *Craft v. Attorney General*, 379 F.Supp. 538 (M.D. Pa. 1974), *U.S. ex rel. Harrison v. Pace*, 379 F.Supp. 354 (E.D. Pa. 1973); *In re Sturm*, 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 1974); *Monks v. New Jersey State Parole Board*, 58 N.J. 238, 277 A.2d 193 (1971). See generally 27 Vand. L. Rev. 1257 (1974).

the Board, it is highly unlikely that arbitrary factors sometimes do not infect the decisionmaking process.[32] Even with their expertise and experience, the members of the Board are subject to the same whims and fallibilities of all administrative decisionmakers, the difference being that the Board is dealing–next to life itself–with the ultimate human commodity–liberty.

Second, without a requirement of written reasons, an applicant has no possibility of pursuing the even limited avenues available for reviewing a wholly erroneous or arbitrary decision of the Board. *Cf. Kohlman v. Norton*, 380 F.Supp. 1073 (D. Conn. 1974). The absence of reasons essentially thwarts any judicial review, leaving to those courts that have reviewed parole board decisions the near impossible task of deciding, after the fact, why a particular decision was made. Even should an appeal procedure be established by the Board, the courts are entitled to a record, as in all other reviews of

[32]As one District Court found: "Present practices and procedures do not provide reasonable assurance that the Board's decisions on applications for parole will be based upon reasonably reliable determinations of fact. In fact, under present Parole Board practices and procedures, there exists a substantial danger of decisions which are based on clearly erroneous assumptions of fact.

. . . .The sources of said danger include evidence of filing errors and omissions, confusions stemming from instances of mistaken identity; possible reliance upon outdated and superceded information; reliance upon unsubstantiated assertions; reliance upon conflicting, unclear, and in some instances not apparently reliable psychological testing data and similar information and the like." *Childs v. U.S. Board of Parole*, 371 F.Supp. 1246, 1248 (D.D.C. 1973), *aff'd* 511 F.2d 1270 (D.C. Cir. 1974).

administrative decisions, upon which careful scrutiny of the ultimate decision can be made. *Cf. SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943).

Third, without a requirement of written reasons, it is humanly impossible for the Board to engage in the depth of deliberation demanded when decisions regarding liberty are made. Eminent commentators have observed the dangers to principled and reasoned decisionmaking flowing from the exercise of unbridled discretion. See K. Davis, *Discretionary Justice: A Preliminary Inquiry*, *passim* (1969). As urged by Judge Mansfield: "A reasons requirement 'promotes thought by the decider,' and compels him to 'recover the relevant points' and 'eschew irrelevancies.' " *U.S. ex rel. Johnson v. Chairman, N.Y. State Board of Parole*, 510 F.2d 925, 931 (2d Cir. 1974), *quoting* M. Frankel, *Criminal Sentences: Law Without Order*, 40-41 (1973)..

Fourth, without a requirement of written reasons, the frustration and despair immeasurably increase. There is no need to recount in these pages the often intolerable conditions a prisoner must endure. To add to these conditions the Kafkaesque nightmare of appearing before the Parole Board only to be denied without any rational explanation is reason enough for this requirement, if due process is to serve its broad, salutary purpose of assuring the individual not only actual fairness but also the appearance of fairness in contacts with the government. See *Monks v. New Jersey State Parole Board*, 58 N.J. 238, 246, 277 A.2d 193, 197 (1971); Board of Directors, National Council on Crime and Delinquency, *Parole Decisions: A Policy Statement*, 19 Crime & Delinq. 137 (1973); Kastenmeier & Eglit, *Parole Release Decisionmaking: Rehabilitation, Expertise, and the Demise of Mythology*, 22 Am. U.L. Rev. 477, 487-91 (1973).

Finally, without a requirement of written reasons, it would be extremely difficult, if not impossible, for the Board to establish a consistent set of standards to guide the applicant throughout the parole release process. "Hopefully a body of rules, principles and precedent would be established which would promote consistency by the Board . . . and provide a basis for critical reappraisal by trained experts . . . or for private groups interested in the parole system. The courts would be educated concerning the probability of parole in particular cases, an education sorely needed, since judges who exercise their power to set minimum sentences . . . are expected to play an important role in the parole process." *U.S. ex. rel. Johnson v. Chairman, N.Y. State Board of Parole, supra*, 500 F.2d at 933.[33]

Inextricably linked to the requirement of written reasons is the desirability for specific guidance to the parole applicant of the conditions or requirements that must be fulfilled to reasonably insure favorable parole consideration. As keenly perceived by one District Court: "The Board has an interest in assuring itself and society that the inmate can be rehabilitated and that the inmate's conduct conforms to the standards established by the Board. An inmate has a right to know why his parole was denied, so that, *inter alia*, he can attempt to correct his misdoings in a proper and successful manner." *Johnson v. Heggie*, 362 F.Supp. 851, 857 (D. Colo. 1973). See also *Candarini v. Attorney General*, 369 F.Supp. 1132, 1137 (E.D.N.Y. 1974). If one purpose of due process is to inject

[33]For cases revealing the criticalness of clear parole policy as a guide to judges in sentencing, see *United States v. Slutsky*, 514 F.2d 1222, 1126-30 (2d Cir. 1975); *Kortness v. United States*, 514 F.2d 167 (8th Cir. 1975).

"fundamental fairness—the touchstone of due process," *Gagnon v. Scarpelli*, 411 U.S. at 790, into an otherwise discretionary system, it would be desirable if written guidance, in addition to a requirement of written reasons for denial, be demanded of the Board.

Petitioners do not envision that the statement will constitute an exhaustive analysis of the reasons and underlying data supporting denial. Neither do we believe that a parroting of one or more of the factors currently considered by the Kentucky Board would pass muster. To inform an inmate that he was denied parole because his attitude toward authority before incarceration was poor or her emotional stability is questionable borders on meaninglessness. Only when the underlying evidentiary and factual circumstances are adequately summarized can the core purposes behind this requirement be achieved. In explaining the conditions, which if fulfilled, would likely result in future parole release, the petitioners recognize that such a requirement might not be applicable to every inmate who appears before the Board. On the other hand, it would not tax the Board appreciable more to ask, in those cases where the Board deems it can formulate appropriate conditions, that such conditions be included in the statement of reasons. Here, petitioners would encourage the conditions to be sufficiently concrete to apprise the prisoner of the particular actions he or she should take (*e.g.*, further training or schooling to insure employability, psychological counseling) prior to the next parole review. Advice such as "you need more time to get together," which was offered to the petitioner Scott (Complaint, para. 13, A. 6), should not be tolerated under the even limited requirement suggested here.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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INDEX TO APPENDIX

Appendix A:
Kentucky Parole Board Regulations

KENTUCKY PAROLE BOARD 501 KAR 1:010

TITLE 501
DEPARTMENT OF JUSTICE
BUREAU OF CORRECTIONS

Chapter 1 KENTUCKY PAROLE BOARD
CHAPTER 1
KENTUCKY PAROLE BOARD
010. Time served for parole eligibility.

501 KAR 1:010. Time served for parole eligibility.

RELATES TO: KRS 439.340(3)
PURSUANT TO: KRS 439.340, 13.082
NECESSITY AND FUNCTION: KRS 439.340 requires the Kentucky Parole Board to promulgate regulations setting forth the time an incarcerated felon is to serve before he will be eligible for parole.

Section 1. Pursuant to the authority vested in the Parole Board by KRS 439.340, the Parole Board will, as a matter of administrative policy, beginning not later than the date of final approval of this regulation, review within a twenty-five (25) month period the case of every inmate who is convicted on or after this date and who is confined in a Kentucky Correctional Facility for felons and who is serving not more than a fifteen (15) year sentence or sentences aggregating not more than fifteen (15) years.

Section 2. All persons confined after the date of final approval of this regulation who are serving sentences of fifteen (15) years or less or sentences aggregating fifteen (15) years or less, shall have their cases reviewed by the board in accordance with the schedule set out below. This schedule will not apply to sentences received as set

out in Section 6, nor will it apply to persons convicted prior to the date of final approval of these regulations. Persons convicted prior to this date will be heard for parole consideration in accordance with the regulations existing at the time of their conviction which this regulation now supersedes.

Time to be serve toward parole review	Sentence being served
4 months	1 year
5 months	More than 1 year and less than 1 1/2 years
6 months	1 1/2 years, up to and including 2 years
7 months	More than 2 years and less than 2 1/2 years
8 months	More than 2 1/2 years and less than 3 years
10 months	3 years
1 year	Over 3 years, up to and including 9 years
2 years	Over 9 years, up to and including 15 years

Reviews thereafter, as long as confinement continues, shall be at the discretion of the board.

Section 3. All persons serving a sentence or sentences aggregating more than fifteen (15) years and not more than twenty-one (21) years shall have their cases reviewed by the board after having served four (4) years of the total sentence, except for sentences received as set out in Section 6. Further reviews thereafter, as long as confinement continues, shall be at the discretion of the board.

Section 4. All persons serving a single life sentence or on multiple term sentences aggregating more than twenty-one (21) years, shall have their cases reviewed after having served six (6) years. Any persons convicted and sentenced on two (2) or more life sentences to be served consecutively, or any person convicted and sentenced on a life sentence and on a sentence or sentences for a term of years and all sentences are to be served consecutively, must serve six (6) years before having their cases reviewed by the board, except for sentences received as set out in Section 6. Further review, as long as confinement continues, shall be at the discretion of the board.

Section 5. A sentence on conviction of a felony imposed upon a confined prisoner for a crime committed prior to the date of his instant commitment, if designated to be served consecutively, shall be added to the sentence or sentences being served to determine eligibility for parole review. However, the aggregate amount of time to be served for parole review eligibility shall not exceed six (6) years. If the additional sentence is designated to be served concurrently or the commitment is silent, he shall be considered as having started to accrue parole review eligibility on the day he was committed on the first sentence.

Section 6. (1) A person receiving a sentence or sentences for a crime or crimes committed while confined in the institution or while on escape from the institution shall not begin accruing eligibility time toward parole review on the latter sentence or sentences until he has become eligible for parole on the sentence or sentences including a life sentence, for which he was originally confined.

(2) In determining parole eligibility for an inmate who has received a sentence or sentences for a crime or crimes committed while on escape or while confined in the institution, the board will require, in addition to the

amount of time required to be served for parole review on the original sentence, the service of additional time in accordance with the requirements set out in Sections 2, 3 or 4.

(3) In determining parole eligibility for an inmate who has received a sentence for an escape, the board will require, in addition to the amount of time to be served for parole review on the original sentence or sentences, and the time required to be served for any crimes committed while in the institution or while on escape, a service of one (1) year on the escape sentence if the sentence is three (3) years or more, before the inmate is eligible for parole consideration. If the sentence for escape or attempted escape is under three (3) years, the parole eligibility for the escape sentence will be determined by the chart in Section 2. In the event the escape occurs prior to the original parole review date and the inmate is returned either before or after this date, the additional time to be served for parole eligibility on the escape sentence shall not start until the day following the corrected original parole review date. If the escape occurs after the original parole review date, the additional time to be served on the escape sentence shall start on the date of his return.

(4) In the event the escape sentence and the sentence or sentences received for a crime or crimes committed while on escape or while confined in the institution are specified to be served concurrently with each other, the sentence requiring the longest time service in accordance with subsections 2 and 3 above will be the controlling factor.

(5) Even though an inmate has received a serve-out or deferment on his original sentence or sentences prior to receiving an escape sentence or any other sentence which he might subsequently receive after being given the serve-out or deferment, he will automatically be brought before the board again when, and not until, he becomes eligible for parole consideration on the additional sentence or sentences.

Section 7. A parole violator having received a sentence for a crime committed while on parole shall start accruing time credit for parole eligibility on the new sentence on the day he was returned as a parole violator.

Section 8. In keeping with the intent of the act, the Parole Board may, with the consent of the majority of the board, review the case of any inmate for parole consideration prior to his eligibility date if it appears advisable to do so. This will not be done until the reason for such action is submitted to all members in writing, along with all supporting documents, and all members will note in writing as to their desire to grant a hearing. This will then be filed in the record of the person in question and made a permanent part of his file in the central office of the Bureau of Corrections.

Section 9. The parole hearing will consist of an interview by the board, or a quorum of the board, with the inmate involved. In instances when the inmate is too ill to appear before the board, the board may, at its discretion, appoint one (1) member to interview the inmate in the hospital where he is confined and report back to the remaining members. In this instance, as in all cases, a vote by a quorum is required before action is taken. In reaching their decision, the board shall consider:

(1) Current offense;
(2) Prior record;
(3) Institutional adjustment and conduct:
(a) Disciplinary reports,
(b) Loss of good time,
(c) Work and program involvement.
(4) Attitude toward authority:
(a) Before incarceration,
(b) During incarceration.
(5) History of alcohol or drug involvement;
(6) History of prior probation, shock probation or parole violations;
(7) Educational and job skills;
(8) Prior employment history;

(9) Emotional stability;
(10) Mental capacities;
(11) Terminal illness;
(12) History of deviant behavior;
(13) Official and community attitudes toward accepting inmate back in the county of conviction;
(14) Review of parole plan:
(a) Housing,
(b) Employment,
(c) Need for community treatment and follow-up resources such as: 1. Halfway houses and residential treatment centers, 2. Comprehensive care centers, 3. Service centers, 4. Individual counselling with private social agencies and private treatment resources such as psychiatrists and psychologists.
(15) Any other factors involved that would relate to the inmate's needs and the safety of the public.

Section 10. In all cases where parole is recommended, it is based upon continued good institutional conduct through the actual release date.

Section 11. All matters relating to parole revocation shall be conducted in the following manner:
(1) Following a preliminary hearing by the staff of probation and parole, Division of Community Services, Bureau of Corrections, in which it has been established that there are reasonable grounds to believe a parole violation has taken place, a copy of the findings from the preliminary hearing and a request for a parole violation warrant are submitted to the director or assistant director of probation and parole, Division of Community Services, who reviews the findings of the preliminary hearing. If he concurs with the request for a warrant, he then submits the findings of the preliminary hearing and the request for the warrant to the chairman of the Parole Board who is authorized to issue warrants for parole violations. If the chairman, upon review, concurs that reasonable grounds exist to believe a parole violation has taken place, a warrant is issued. In cases where the person is being charged with a parole violation in that he has absconded from supervision and his whereabouts are unknown, a warrant is issued upon a sworn affidavit by the supervising parole officer with the approval of his supervisor and the approval of either the director or assistant director of probation and parole, Division of Community Services. Upon apprehension, the preliminary hearing is held; and if the hearing officer finds reasonable grounds to believe a violation has occurred, then the procedure is the same as in all other types of preliminary hearings conducted by the Division of Community Services, Probation and Parole, Bureau of Corrections, Department of Justice.

(2) Following the preliminary hearing and the return to the institution of the person who has been charged with violating the conditions of his parole, he is given a final revocation hearing before the entire board or a quorum thereof upon their next scheduled hearing date at the institution. At this hearing, the board reviews with him the charges specified on the warrant. If he agrees that the allegations are true, the board then reviews with him all other mitigating factors concerning this violation and his adjustment while under parole supervision prior to the time the violation took place before any disposition is made in his case. If the person charged with the parole violation denies the allegations on the warrant, his case is then continued until the board's next scheduled hearing date at the institution. In the interim, the person alleged to have violated the conditions of his parole is given the opportunity to designate relevant witnesses and/or documents he desires to present to the board in his behalf at the continued hearing. When necessary, the chairman of the board will issue subpoenas for the witnesses and/or documents requested by the person provided no claims for expenses incurred by these witnesses will be submitted to the board as the board has no authorization to pay such expenses. At the continued hearing, the board will also subpoena the supervising parole officer who alleged that the violation took place and any supporting witnesses in the case. Following the conclusion of the presentation of evidence by both sides at the continued hearing, the board decides whether a violation of the conditions of parole has occurred. If the board finds that a violation has occurred,

the board then considers the mitigating circumstances surrounding the violation and the adjustment of the person while under parole supervision prior to the parole violation as presented during the hearing. A disposition of the case of the parole violator is then made. (DC-Rg-6; 1 Ky.R. 348; eff. 4-9-75.)

RULES AND REGULATIONS

ADULT

[Guidelines for decisionmaking, customary total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Immigration law violations Minor theft (includes larceny and simple possession of stolen property less than $1,000). Walkaway	6 to 10 mo.	8 to 12 mo.	10 to 14 mo.	12 to 16 mo.
LOW MODERATE				
Alcohol law violations Counterfeit currency (passing/possession less than $1,000). Drugs marihuana, simple possession (less than $500) Forgery/fraud (less than $1,000) Income tax evasion (less than $10,000) Selective Service Act violations Theft from mail (less than $1,000)	8 to 12 mo.	12 to 16 mo.	16 to 20 mo.	20 to 25 mo

Appendix B:
U.S. Parole Board Guidelines for
Parole Release Consideration

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
MODERATE				
Bribery of public officials Counterfeit currency (passing/possession $1,000 to $19,999). Drugs: Marihuana, possession with intent to distribute/sale (less than $5,000). "Soft drugs", possession with intent to distribute/sale (less than to $5,00) Embezzlement (less than $20,000) Explosives, possession/transportation Firearms Act, possession/purchase/sale (single weapon—not sawed-off shotgun or machine gun). Income tax evasion ($10,000 to $50,000) Interstate transportation of stolen/forged securities (less than $20,000). Mailing threatening communications Misprision of felony Receiving stolen property with intent to resell (less than $20,000). Smuggling/Transporting of Aliens Theft/forgery/fraud ($1,000 to $19,999) Theft of motor vehicle (not multiple theft or for resale).	12 to 16 mo.	16 to 20 mo.	20 to 24 mo.	24 to 30 mo.
HIGH				
Burglary or larceny (other than embezzlement) from bank or post office. Counterfeit currency (passing/possession $20,000-$100,000). Counterfeiting (manufacturing) Drugs: Marihuana, possession with intent to distribute/sale ($5,000 or more). "Soft drugs", possession with intent to distribute/sale($500 to $5,000) Embezzlement ($20,000 to $100,000) Firearms Act, possession/purchase sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Interstate transportation of stolen/forged securities ($20,000 to $100,000). Mann Act (no force—commercial purposes) Organized vehicle theft Receiving stolen property ($20,000 to $100,000) Theft/forgery/fraud ($20,000 to $100,000)	16 to 20 mo.	20 to 26 mo.	26 to 32 mo.	32 to 38 mo.
VERY HIGH				
Robbery (weapon or threat) Drugs: "Hard drugs" (possession with intent to distribute sale) [no prior conviction for sale of "hard drugs"]. "Soft drugs", possession with intent to distribute/sale (over $5,000) Extortion Mann Act (force) Sexual act (force)	26 to 30 mo.	30 to 45 mo.	45 to 55 mo.	55 to 65 mo.

2b

3b

Appendix C:
U.S. Parole Board Regulations for Parole Release

4210 and 5005-5037, 28 CFR Chapter 1, Part 2, is amended as set forth below, effective October 6, 1975.

Approved: August 29, 1975.

Dated: August 29, 1975.

MAURICE H. SIGLER,
Chairman,
United States Board of Parole.

Sec.

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
GREATEST				
Aggravated felony (e.g. robbery, sexual act, aggravated assault)—weapon fired or personal injury. Aircraft hijacking. Drugs: "Hard drugs" (possession with intent to distribute/sale) for profit [prior conviction(s) for sale of "hard drugs"]. Espionage. Explosives (detonation). Kidnapping. Willful homicide.	(Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)			

NOTES

1. These guidelines are predicated upon good institutional conduct and program performance.
2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
5. If a continuance is to be given, allow 30 d (1 mo) for release program provision.
6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes.

AUTHORITY: 18 U.S.C. 4201–4210, 5001–5037; 28 CFR Part 0, Subpart v.

§ 2.1 Definitions.

(a) For the purpose of this part, the term "Board" means the United States Board of Parole; and the terms "Youth Correction Division" and "Division" each mean the Youth Correction Division of the Board.

(b) As used in this part, the term "National Appellate Board" means the Chairman, Vice Chairman, and at least

one member of the Board, all of whom also serve as National Appellate Board members in the headquarters office, i.e., Washington, D.C.

(c) All other terms used in this part shall be deemed to have the same meaning as identical or comparable terms have when those term are used in Chapter 311 of Part IV of Title 18 of the United States Code or Chapter I, Part O, Subpart V of Title 28 of the Code of Federal Regulations.

§ 2.2 Eligibility for parole, regular adult sentences.

Except as set out in the following sections, a federal prisoner wherever confined and serving a definite term or terms of over one hundred and eighty days may, in accordance with the regulations prescribed in this part, be released on parole after serving one-third of such term or terms or after fifteen years of a life sentence or a sentence of over forty-five years (18 U.S.C. 4202).

§ 2.3 Same; adult indeterminate sentences.

A Federal prisoner, other than a juvenile delinquent or a committed youth offender, who has been sentenced to a maximum term of imprisonment in excess of one year may, if the court has designated a minimum term to be served, which term may be less than, but not

more than, one-third of the maximum sentence imposed, be released on parole after serving the minimum term. In cases in which a court imposes a maximum sentence of imprisonment upon a prisoner and specifies that the prisoner may become eligible for parole at such times as the Board may determine, the prisoner may be released on parole at any time in the discretion of the Board (18 U.S.C. 4208(a)).

§ 2.4 Same; juvenile delinquents.

The Board of Parole shall release from custody, on such conditions as it deems necessary, each juvenile delinquent who has been committed, as soon as the Board is satisfied that he is likely to remain at liberty without violating the law and when such release would be in the interest of justice (18 U.S.C. 5041).

§ 2.5 Same; committed youth offenders.

The Youth Correction Division may at any time, after reasonable notice to the Director of the Bureau of Prisons, release conditionally under supervision a committed youth offender. A youth offender committed under section 5010(b) of title 18 of the United States Code to a maximum six year term shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction. A youth offender committed under section 5010

(c) of title 18 of the United States Code to a maximum term which is more than six years shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court (18 U.S.C. 5017).

§ 2.6 Same; sentences under the Narcotic Addict Rehabilitation Act.

The Narcotic Addict Rehabilitation Act provides for sentence to a maximum term for treatment as a narcotic addict. Parole may be ordered by the Board after at least six months in treatment, not including any period of time for "study" prior to final judgment of the court. Before parole is ordered by the Board, the Surgeon General or his designated representative must certify that the prisoner has made sufficient progress to warrant his release and the Attorney General or his designated representative must also report to the Board whether the prisoner should be released. Recertification by the Surgeon General prior to reparole consideration is not required (18 U.S.C. 4254).

§ 2.7 Same; sentences under the gun control statute.

A Federal prisoner sentenced under 18 U.S.C. 924(a) for violation of Federal gun control laws is considered eligible for parole at such time as the Board may determine. Prisoners sentenced under this provision are considered for parole in the same manner as if they had been sentenced under 18 U.S.C. 4208(a)(2).

§ 2.8 Same; sentences of six months or less followed by probation.

A Federal prisoner sentenced under 18 U.S.C. 3651 to serve a period of six months or less in a jail type or treatment institution, with a period of probation to follow, is not eligible for parole.

§ 2.9 Study prior to sentencing.

(a) When an adult Federal offender has been committed to an institution by the sentencing court for observation and study prior to sentencing under the provisions of 18 U.S.C. 4208(b), the report to the sentencing court is prepared and submitted directly by the United States Bureau of Prisons.

(b) The court may order a youth to be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Youth Correction Division shall report its findings to the court (18 U.S.C. 5010(e)).

§ 2.10 Date service of sentence commences.

(a) Service of a sentence of imprisonment commences to run on the date on which the person is received at the penitentiary, reformatory, or jail for service of the sentence: *Provided, however,* That any such person shall be allowed credit toward the service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.

(b) Service of the sentence of any person who is committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served shall commence to run from the date on which he is received at such jail or other place of detention.

(c) Service of the sentence of a committed youth offender or a person committed under the Narcotic Addict Rehabilitation Act commences to run and continues to run uninterruptedly from the date of conviction, except when such offender is on bail pending appeal or is in escape status.

§ 2.11 Application for parole.

(a) A prisoner, other than a juvenile delinquent, a committed youth offender, or an offender committed under the Narcotic Addict Rehabilitation Act, desiring to apply for parole shall execute such application forms as may be prescribed by the Board. Such forms shall be available at each Federal institution and shall be provided to prisoners eligible for parole. Such prisoners may waive parole consideration on a form provided for that purpose. If such a prisoner waives parole consideration, he may later supply for parole and may be heard during the next visit of the Board to the institution where he is confined, provided he has applied prior to 45 days from the first scheduled date of this visit. A prisoner who receives an initial hearing may not waive any subsequent review hearing scheduled by the Board except as provided in § 2.16(c). New parole applications are not necessary for such review hearings.

(b) A prisoner who is required to apply before receiving a parole hearing but who fails to submit either an application or a waiver form shall be referred to the Board's representatives by the chief executive officer of the institution. The prisoner shall then receive an explanation of his right to apply for parole at a later date.

(c) Prisoners committed under the Federal Juvenile Delinquency Act. The Youth Correction Act, and the Narcotic Addict Rehabilitation Act shall be considered for parole without application

and may not waive parole consideration.

(d) Notwithstanding the above provisions relating to parole application, all prisoners prior to initial hearing shall be provided with an inmate background statement by the Bureau of Prisons for completion by the prisoner.

§ 2.12 Hearing procedure.

(a) Prisoners shall be given written notice of the time and place of the hearing described in §§ 2.13 and 2.14. Prisoners may be represented at hearings by a person of their choice. The function of the prisoner's representative shall be to offer a statement at the conclusion of the interview of the prisoner by the examiner panel, and to provide such additional information as the examiner panel shall request. Interested parties who oppose parole may select a representative to appear and offer a statement. The presiding hearing examiner shall limit or exclude any irrelevant or repetitious statement.

(b) No interviews with the Board, or any representative thereof, shall be granted to a prisoner unless his name is docketed for a hearing in accordance with Board procedures. Hearings shall not be open to the public, and the records

§ 2.13 Initial hearing.

(a) An initial hearing shall be conducted by a panel of two hearing ex-

aminers designated by the Board. The examiner panel shall discuss with the prisoner his offense severity rating and salient factor score as described in § 2.20, his institutional conduct, and, in addition, any other matter the panel may deem relevant. At the conclusion of the hearing, the examiner panel shall inform the prisoner of its tentative decision, and, if parole is denied, of the reasons therefor.

(b) In accordance with § 2.18 the reasons for parole denial may include, but are not limited to, the following reasons, with further specification where appropriate:

(1) Release at this time would depreciate the seriousness of the offense committed and would thus be incompatible with the welfare of society.

(2) There does not appear to be a reasonable probability at this time that the prisoner would live and remain at liberty without violating the law.

(3) The prisoner has (a serious) (repeated) disciplinary infraction(s) in the institution.

(4) Additional institutional treatment is required to enhance the prisoner's capacity to lead a law-abiding life.

(c) In lieu of or in combination with the reasons in paragraph (b) (1) and (2) of this section the prisoner after initial hearings shall be furnished a guideline

evaluation statement which includes the prisoner's salient factor score and offense severity rating as described in § 2.20, as well as the reasons for a decision to continue the prisoner for a period outside the range indicated by the guidelines.

(d) Written notification of the decision or referral under § 2.17 or § 2.24 shall be mailed or transmitted to the prisoner within fifteen working days of the date of the hearing except in emergencies. If parole is denied, the prisoner shall also receive in writing as a part of the decision, the reasons therefor.

§ 2.14 Review hearings.

All hearings subsequent to the initial hearing shall be considered as review hearings. Review hearings by examiners designated by the Board shall be scheduled for each Federal institution, and prisoners shall appear for such hearings in person, except for the following cases:

(a) During the month preceding a regularly scheduled review hearing, a case may be reviewed on the record by an examiner panel (including a current institutional progress report). If the decision is to grant parole, no hearing shall be conducted.

(b) A prisoner sentenced under the Youth Corrections Act or Federal Juvenile Delinquency Act or a prisoner sentenced to a maximum term of more than

18 months under 18 U.S.C. 4208(a)(2) or 924(a) shall not be continued past one-third of his maximum sentence at an initial hearing without further hearing upon completion of one-third of his maximum sentence.

(c) Notification of review decisions shall be given as set forth in § 2.13(d). No prisoner shall be continued for more than three years from the time of last hearing without further review.

§ 2.15 Petition for consideration of parole prior to date set at hearing.

When a prisoner has met the minimum time of imprisonment required by law, the Bureau of Prisons may petition the responsible Regional Director for reopening the case under § 2.28 and consideration of parole prior to the date set by the Board at the initial or review hearing. The petition must show cause why it should be granted, i.e., an emergency, hardship, or the existence of other extraordinary circumstances that would warrant consideration of early parole.

§ 2.16 Parole of prisoner in state or territorial institution.

(a) Any person who has been convicted of any offense against the United States which is punishable by imprisonment but who is confined therefor in a state reformatory or other state or territorial institution, shall be eligible for

parole by the Board on the same terms and conditions by the same authority, and subject to recommittal for the violation of such parole, as though he were confined in a Federal penitentiary, reformatory, or other correctional institution.

(b) Federal prisoners serving concurrent state and Federal sentences in state, local, or territorial institutions shall be furnished upon request parole application forms. Upon receipt of the application and any supplementary classification material submitted by the institution, the parole decision shall be made by an examiner panel of the appropriate region on the record only.

(c) Prisoners who are serving federal sentences exclusively but who are being boarded in state, local or territorial institutions may be considered for parole on the record only, provided they sign a waiver of their right to a personal hearing. If such a prisoner does not waive a personal hearing, he may be transferred by the Bureau of Prisons to a Federal institution where he will be considered for parole at the next visit by an examiner panel of the Board.

§ 2.17 Original jurisdiction cases.

(a) A Regional Director may designate certain cases as original jurisdiction

cases. The Regional Director shall then forward the case with his vote, and any additional comments he may deem germane, to the National Directors for decision. Decisions shall be based upon the concurrence of three votes with the appropriate Regional Director and each National Director having one vote. Additional votes, if required, shall be cast by the other Regional Directors on a rotating basis as established by the Chairman of the Board.

(b) The following criteria will be used in designating cases as original jurisdiction cases:

(1) Prisoners who have committed serious crimes against the security of the Nation, e.g., espionage, or aggravated subversive activity.

(2) Prisoners whose offense behavior (A) involved an unusual degree of sophistication or planning or (B) was part of a large scale criminal conspiracy or a continuing criminal enterprise.

(3) Prisoners who have received national or unusual attention because of the nature of the crime, arrest, trial, or prisoner status, or because of the community status of the offender or his victim.

(4) *Long-term sentences.* Prisoners sentenced to a maximum term of forty-five years (or more) or prisoners serving life sentences.

§ 2.18 Granting of parole.

The granting of parole rests in the discretion of the Board of Parole. The Board may parole a prisoner who is otherwise eligible if (a) in the opinion of the Board such release is not incompatible with the welfare of society; (b) he has observed substantially the rules of the institution in which he is confined; and (c) there is a reasonable probability that he will live and remain at liberty without violating the laws (18 U.S.C. 4203(a)).

§ 2.19 Consideration by the Board.

In the exercise of its discretion, the Board generally considers some or all of the following factors and such others as it may deem appropriate:

(a) Sentence data:

(1) Type of sentence;

(2) Length of sentence;

(3) Recommendations of judge, U.S. Attorney, and other responsible officials.

(b) Present offense:

(1) Facts and circumstances of the offense;

(2) Mitigating and aggravating factors;

(3) Activities following arrest and prior to confinement, including adjustment on bond or probation, if any.

(c) Prior criminal record:

(1) Nature and pattern of offenses;

(2) Adjustment to previous probation, parole, and confinement;

(3) Detainers.

(d) Changes in motivation and behavior:

(1) Changes in attitude toward self and others;

(2) Reasons underlying changes;

(3) Personal goals and description of personal strength or resources available to maintain motivation for law abiding behavior.

(e) Personal and social history:

(1) Family and marital history;

(2) Intelligence and education;

(3) Employment and military experience;

(4) Physical and emotional health.

(f) Institutional experience:

(1) Program goals and accomplishments:

(i) Academic;

(ii) Vocational education, training or work assignments;

(iii) Therapy.

(2) General adjustment:

(i) Inter-personal relationships with staff and inmates;

(ii) Behavior. including misconduct.

(g) Community resources, including release plans:

(1) Residence; live alone, with family or others;

(2) Employment, training, or academic education;

(3) Special needs and resources to meet them.

(h) Results of scientific data and tools;

(1) Psychological tests and evaluations;

(2) Statistical parole experience tables (salient factor score).

(i) Paroling policy guidelines as set forth in § 2.20;

(j) Comments by hearing examiners, evaluative comments supporting a decision, including impressions gained from the hearing.

§ 2.20 Paroling policy guidelines; statement of general policy.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Board of Parole has adopted guidelines for parole release consideration.

(b) These guideline indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for the cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered. For example, cases with exceptionally good institutional program achievement may be considered for earlier release.

(d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) These guidelines do not apply to parole revocation or reparole considerations. The Board shall review the guidelines periodically and may revise or modify them at any time as deemed appropriate.

§ 2.21 Reports considered.

Decisions as to whether a parole shall be granted or denied shall be determined on the basis of the application, if any, submitted by the prisoner, together with the classification study and all reports assembled by all the services which shall

Salient Factor Score

Case name_____ Register No_____

Item A_____ ☐
No prior convictions (adult or juvenile) = 2
One or two prior convictions = 1
Three or more prior convictions = 0

Item B_____ ☐
No prior incarcerations (adult or juvenile) = 2
One or two prior incarcerations = 1
Three or more prior incarcerations = 0

Item C_____ ☐
Age at first commitment (adult or juvenile) 18 years or older = 1
Otherwise = 0

Item D_____ ☐
Commitment offense did not involve auto theft = 1
Otherwise = 0

Item E_____ ☐
Never had parole revoked or been committed for a new offense while on parole = 1
Otherwise = 0

Item F_____ ☐
No history of heroin or opiate dependence = 1
Otherwise = 0

Item G_____ ☐
Has completed 12th grade or received GED (prior to this commitment) = 1
Otherwise = 0

Item H_____ ☐
Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community = 1
Otherwise = 0

Item I_____ ☐
Release plan to live with spouse and/or children = 1
Otherwise = 0

Total score_____ ☐

ıave been active in the development of he case. These reports may include the eports by the prosecution officers, re-orts by or for the sentencing court, ecords from the Federal Bureau of In-estigation, reports from the officials in ach institution in which the applicant hall have been confined, all records of ocial agency contacts, and all corre-pondence and such other records as are ecessary or appropriate for complete resentation of the case. Before making decision as to whether a parole should e granted or denied in any particular ase, the Board will consider all avail-ble relevant and pertinent information oncerning the case. The Board encour-ges the submission of such information y interested persons.

2.22 Communication with the Board.

Attorneys, relatives, or interested par-es wishing a personal interview to dis-uss a specific case with a representative f the Board of Parole must submit a ritten request to the appropriate re-ional office setting for the nature of he information to be discussed. Such ersonal interview may be conducted by taff personnel in the regional offices. ersonal interviews, however, shall not e held by an examiner or member of he Board, except under the Board's ppeals procedures.

§ 2.23 Delegation to hearing examiners.

(a) There is hereby delegated to hear-ing examiners the authority to make tentative decisions relative to the grant-ing or denial of parole, or reparole and revocation or reinstatement of parole or mandatory release and to fix conditions of parole.

(b) Hearing examiners shall function as two-man panels and the concurrence of both examiners shall be required for their decision. In the event of a split decision by the panel, the appropriate regional Administrative Hearing Exam-iner shall cast the deciding vote.

(c) When a hearing examiner panel proposes to make a decision which falls outside of explicit guidelines for parole decision-making promulgated by the Board, the case shall be reviewed by the appropriate regional Administrative Hearing Examiner. When an Adminis-trative Hearing Examiner does not con-cur in a decision of an examiner panel to set a parole effective date or continu-ance outside the Board's guidelines he may with the concurrence of the Re-gional Director modify the date to the nearest limit of the guidelines.

(d) In the event the Administrative Hearing Examiner is serving as a mem-ber of a hearing examiner panel or is otherwise unavailable, cases requiring his action under paragraphs (b) and (c)

of this section will be referred to another hearing examiner.

(e) A tentative decision of a hearing examiner panel, subject to the provisions of § 2.23(c), shall become effective upon review and docketing at the Regional Office unless action is initiated by the Regional Director under § 2.24.

§ 2.24 Review of panel decision by the Regional Director and the National Directors.

A Regional Director may review the decision of any examiner panel and refer this decision, prior to written notification to the prisoner, with his recommendation and vote to the National Directors for reconsideration and any action deemed appropriate. Written notice of this reconsideration action shall be mailed or transmitted to the prisoner within fifteen working days of the dat . of the hearing. The Regional Director and each National Director shall have one vote and decisions shall be based upon the concurrence of two votes.

§ 2.25 Appeal of hearing panel decision.

(a) A prisoner may file with the responsible Regional Director a written appeal of a decision of a hearing examiner panel or a decision under § 2.24 to grant, deny or revoke parole or to revoke mandatory release. This appeal must be filed on a form provided for that purpose

within thirty days from the date of entry of such decision. The appeal shall be considered by the Regional Director who may affirm the decision, order a new institutional hearing, order a regional appellate hearing, reverse the decision, or modify a continuance or the effective date of parole. Reversal of a decision or the modification of such a decision by more than one hundred eighty days, whether based upon the record or following a regional appellate hearing, shall require the concurrence of two out of three Regional Directors. Appellate decisions requiring a second or additional vote shall be referred to other Regional Directors on a rotating basis as established by the Chairman.

(b) Regional appellate hearings shall be held at the regional office before the Regional Director. Attorneys, relatives and other interested parties who wish to appear must submit a written request to the Regional Director stating their relationship to the prisoner and the general nature of the information they wish to present. The Regional Director shall determine if the requested appearances will be permitted. The prisoner shall not appear personally.

(c) If no appeal is filed within thirty days of entry of the original decision, this decision shall stand as the final decision of the Board.

(d) Appeals under this section may be based only upon the following grounds:

(1) The reasons given for a denial or continuance do not support the decision; or

(2) There was significant information in existence but not known at the time of the hearing.

§ 2.26 Appeal to National Appellate Board.

(a) A prisoner may file a written appeal of the Regional Director's decision under § 2.25 to the National Appellate Board on a form provided for that purpose within thirty days after the entry of the Regional Director's written decision. The National Appellate Board may, upon the concurrence of two members, affirm, modify, or reverse the decision, or order a rehearing at the institutional or regional level.

(b) The bases for such appeal shall be the same as for a regional appeal as set forth in § 2.25(d). However, any matter not raised on a regional level appeal may not be raised on appeal to the National Appellate Board.

(c) Decisions of the National Appellate Board shall be final.

§ 2.27 Appeal of original jurisdiction cases.

(a) Cases decided under the procedure specified in § 2.17 may be appealed within thirty days of the entry of the decision on a form provided for this purpose. Attorneys, relatives, and other interested parties who wish to submit written information in support of a prisoner's appeal should send such information to the National Appellate Board Executive, United States Board of Parole, 320 First Street NW., Washington, D.C. 20537. Appeals of original jurisdiction cases shall be reviewed by the entire Board at its next quarterly meeting. A quorum of five members shall be required and all decisions shall be by majority vote. The Chairman shall vote on the decision only in the absence of a member. This appellate decision shall be final.

(b) Attorneys, relatives, or other interested parties who wish to speak for or against parole at such consideration must submit a written request to the Chairman of the Board stating their relationship to the prisoner and the general nature of the material they wish to present. The Chairman shall determine if the requested appearances will be permitted.

(c) If no appeal is filed within thirty days of the entry of the decision under § 2.17, this decision shall stand as the final decision of the Board.

(d) The bases for this appeal shall be the same as for a regional appeal as set forth in § 2.25(d).

§ 2.28 Reopening of cases.

Notwithstanding the appeal procedure of § 2.25 and § 2.26, the appropriate Regional Director may on his own motion reopen a case at any time upon the receipt of new information of substantial significance and may then take any action authorized under the provisions and procedures of § 2.25. Original jurisdiction cases may be reopened upon the motion of the appropriate Regional Director under the procedures of § 2.17.

§ 2.29 Withheld and forfeited good time.

(a) Section 4202 of title 18 of the United States Code permits Federal prisoners to be paroled if they have observed the rules of the institution in which they are confined and if they are otherwise eligible for parole. Any forfeiture of statutory good time shall be deemed to indicate that the prisoner has violated the rules of the institution to a serious degree, and a parole will not be granted in any such case in which such a forfeiture remains effective against the prisoner concerned. Any withholding of statutory good time shall be deemed to indicate that the prisoner has engaged in some less serious breach of the rules of the institution. Nevertheless, parole will not usually be granted unless and until such good time has been restored.

(b) Neither a forfeiture of good time nor a withholding of good time shall bar a prisoner from applying for and receiving a parole hearing.

(c) The above restrictions shall not apply, however, to the forfeiture or withholding of *extra good time* which is granted because of meritorious behavior. Parole may be ordered without regard to a prisoner's status insofar as *extra good time* is concerned, although the reasons for any forfeiture or withholding will be included among the other factors used in making the parole decision.

§ 2.30 Release on parole.

(a) A grant of parole shall not be deemed to be effective until a certificate of parole has been delivered to the prisoner.

(b) Parole release dates generally will not be set more than six months from the date of the parole hearing. Exceptions may be made in extraordinary situations or when necessary to permit an adequate period of residence in a Community Treatment Center. Such residence in a Community Treatment Center shall not generally exceed one hundred and twenty days. An effective date of parole shall not be set for a Saturday, Sunday, or a legal holiday.

(c) When an effective date of parole has been set by the Board, release on

that date shall be conditioned upon continued good conduct by the prisoner and the completion of a satisfactory plan for parole supervision. The appropriate Regional Director may, on his own motion, reconsider any case prior to release and may reopen and advance or retard a parole date. A parole grant may be retarded for up to one hundred and twenty days without a hearing for development and approval of release plans.

§ 2.31 False or withheld information.

All paroles are ordered on the assumption that information from the prisoner has not been fraudulently given or withheld from the Board. If evidence comes to the attention of the Board that a prisoner willfully concealed or misrepresented information deemed significant, the Regional Director may schedule a hearing to determine whether parole should be revoked or rescinded. Such a hearing shall be conducted in accordance with the procedure set out in § 2.37 (b) (2).

§ 2.32 Committed fines.

In any case in which a prisoner shall have had a fine imposed upon him by the committing court for which he is to stand committed until it is paid or until he is otherwise discharged according to law, such prisoner shall not be released

on parole or mandatory release until payment of the fine, or until the fine commitment order is discharged according to law as follows:

(a) An indigent prisoner may make application to a U.S. Magistrate in the District wherein he is incarcerated or to the chief executive officer of the institution setting forth, under institutional regulations, his inability to pay such fine; if the magistrate or chief executive officer shall find that the prisoner, having no assets exceeding $20 in value except such as are by law exempt from being taken on execution for debt, is unable to pay the fine, and if the prisoner takes a prescribed oath of indigency, he shall be discharged from the commitment obligation of the committed fine sentence.

(b) If the prisoner is found to possess assets in excess of the exemption in paragraph (a) of this section, nevertheless if the chief executive officer of the institution or U.S. Magistrate shall find that retention of all of such assets is reasonably necessary for his support or that of his family, upon taking of the prescribed oath concerning his assets the prisoner shall be discharged from the commitment obligation of the committed fine sentence. If the chief executive officer of the in titution or U.S. Magistrate shall find that retention by the prisoner of

any part of his assets is reasonably necessary for his support or that of his family, the prisoner upon taking of the prescribed oath concerning his assets, shall be discharged from the commitment obligation of the committed fine sentence upon payment on account on his fine of that portion of his assets in excess of the amount found to be reasonably necessary for his support or that of his family.

(c) Discharge from the commitment obligation of any committed fine sentence does not discharge the prisoner's obligation to pay the fine as a debt due the United States.

§ 2.33 Parole to detainers; statement of policy.

The policy of the Board with regard to parole to detainers is in general accord with the principles recommended by the Association of Administrators of the Interstate Compact for the Supervision of Parolees and Probationers:

(a) The status of detainers held against prisoners in Federal institutions will be investigated, so far as is reasonably possible, prior to parole hearings.

(b) In appropriate cases summary information regarding such prisoner will be provided to state or local authorities. The Board urges institution officials to provide such information.

(c) Where the detainer is not lifted, the Board may grant parole to such detainer if a prisoner is considered in other respects to be a good parole risk. Ordinarily, however, the Board will grant parole to such detainer only if the status of that detainer has been investigated.

(d) The Board will cooperate in working out arrangements for concurrent supervision with other jurisdictions where it is feasible and where release on parole appears to be justified.

(e) The presence of a detainer is not of itself a valid reason for the denial of parole. It is recognized that where the prisoner appears to be a good parole risk, there may be distinct advantage in granting parole despite a detainer.

§ 2.34 Parole to local or immigration detainers.

(a) When a state or local detainer is outstanding against a prisoner whom the Board wishes to parole, the Board may order either of the following:

(1) "Parole to the actual physical custody of the detaining authorities only." In this event, release is not to be effected except to the detainer. When such a detainer is withdrawn, the prisoner is not to be released unless and until the Board makes a new order of parole.

(2) "Parole to the actual physical custody of the detaining authorities or an

approved plan." In this event, release is to be effected even though the detainer might be withdrawn, providing there is an acceptable plan for community supervision.

(b) When the Board wishes to parole a prisoner subject to a detainer filed by Federal immigration officials, the Board may order one of the following:

(1) "Parole for deportation only." In this event, release is not to be effected unless immigration officials make full arrangements for deportation immediately upon release.

(2) "Parole to the actual physical custody of the immigration authorities only." In this event, release is not to be effected unless immigration officials take the prisoner into custody—regardless of whether or not deportation follows.

(3) "Parole to the actual physical custody of the immigration authorities or an approved plan." In this event, release is to be effected regardless of whether or not immigration officials take the prisoner into custody, providing there is an acceptable plan for community supervision.

(c) As used in this section "parole to a detainer" means release to the "physical custody" of the authorities who have lodged the detainer. Temporary detention in a jail in the county where the institution of confinement is located does

not constitute release on parole. If the authorities who lodged the detainer do not take the prisoner into custody for any reason, he shall be returned to the institution to await further order from the Board.

§ 2.35 Mental competency proceedings.

(a) Whenever a prisoner or parolee is scheduled for a hearing in accordance with the provisions of this part and reasonable doubt exists as to his mental competency, i.e., his ability to understand the nature of and participate in scheduled proceedings, a preliminary hearing to determine his mental competency shall be conducted by a panel of hearing examiners or other official(s) (including a U.S. Probation Officer) designated by the Board of Parole.

(b) At the competency hearing, the hearing examiners or designated official(s) shall receive oral or written psychiatric testimony and other evidence that may be available. A preliminary determination of the prisoner's mental competency shall be made upon the testimony, evidence, and personal observations of the prisoner. If the examiner panel or designated official(s) determines that the prisoner is mentally competent, the previously scheduled hearing shall be held. If they determine that the

prisoner is not mentally competent, the previously scheduled hearing shall be temporarily postponed.

(c) Whenever the hearing examiners or designated official(s) determine that a person is incompetent and postpone the previously scheduled hearing, they shall forward the record of the preliminary hearing with their findings to the Regional Director for review. If the Regional Director concurs with their findings, he shall order the temporarily postponed hearing to be postponed indefinitely until such time as it is determined that the prisoner or parolee has recovered sufficiently to understand the nature of and participate in the proceedings and, in the case of a parolee, may order such parolee committed to a Bureau of Prison's facility for further examination. In any such case, the Regional Director shall require a progress report at least every six months on the mental health of the prisoner. When the Regional Director determines that the prisoner has recovered sufficiently, he shall reschedule the hearing for the earliest possible date.

(d) If the Regional Director disagrees with the findings of the hearing examiners or designated official(s) as to the mental competency of the prisoner, he shall take such action as he deems appropriate.

§ 2.36 Release plans.

(a) A grant of parole is conditioned upon the approval of release plans by the Regional Director. In general, the following factors should be present before a prisoner is released after parole has been granted:

(1) The probation officer to whom the releasee is assigned may, in his discretion, require that there be available to the releasee an adviser who is a responsible, reputable, and law-abiding citizen living in or near the community in which the releasee will reside. The adviser should act as a source of advice for the releasee relative to community adjustment. The adviser may provide special services such as vocational placement, personal counsel, or referral to community agencies. The adviser is expected to report to the probation officer any law violation or serious misconduct on the part of the releasee. The adviser may be required by the probation officer to countersign the parolee's monthly supervision report to indicate actual contact with the parolee.

(2) There should be satisfactory evidence that the prospective parolee will be legitimately employed following his release; and

(3) There should be satisfactory assurance that necessary aftercare will be available to a parolee who is ill or who

has some other problem which requires special care.

(b) Generally, parolees will be released only to the place of their legal residence unless the Board is satisfied that another place of residence will serve the public interest more effectively or will improve the probabilities of the applicant's readjustment.

§ 2.37 Rescission of parole.

(a) When an effective date of parole has been set by the Board, release on that date shall be conditioned upon continued good conduct by the prisoner. If a prisoner has been granted parole and has subsequently been charged with institutional misconduct sufficient to become a matter of record, the Regional Director shall be advised promptly of such misconduct. The prisoner shall not be released until the institution has been notified that no change has been made in the Board's order to parole.

(1) Upon receipt of information that a prisoner has violated the rules of the institution, the Regional Director may retard the parole grant for up to sixty days without a hearing or may retard the parole grant and schedule the case for a rescission hearing. If the prisoner was confined in a federal prison at the time of the order retarding parole, the rescission hearing shall be scheduled for

the next docket of parole hearings at the institution. If the prisoner was residing in a federal community treatment center or a state or local halfway house, the rescission hearing shall be scheduled for the first docket of parole hearings after return to a federal institution. When the prisoner is given written notice of the Board action regarding parole, he shall be given notice of the charges of misconduct to be considered at the rescission hearing. The purpose of the rescission hearing shall be to determine whether rescission of the parole grant is warranted. At the rescission hearing the prisoner may be represented by a person of his choice and may present documentary evidence.

(2) An institution discipline committee hearing conducted by the institution resulting in a finding that the prisoner has violated the rules of his confinement, may be relied upon by the Board as conclusive evidence of institutional misconduct.

(3) If the parole grant is rescinded, the prisoner shall be furnished a written statement of the findings of misconduct and the evidence relied upon.

(b) (1) Upon receipt of new information adverse to the prisoner regarding matters other than institutional misconduct, the Board acting upon the procedures of § 2.17 may retard a previ-

ously granted parole and schedule the case for an institutional review hearing on the next docket of parole hearings or at the first docket of parole hearings following return to a federal institution.

(2) The prisoner shall be given notice of the nature of the new adverse information upon which the rescission consideration is to be based. The hearing shall be conducted in accordance with the procedures set out in §§ 2.12 and 2.13. The purpose of the hearing shall be to determine if the parole grant should be rescinded or if a new parole date should be established.

§ 2.38 Sponsorship of parolees; statement of policy.

It is the policy of the Youth Corrections Division to cooperate with groups desiring to serve as sponsors of parolees. In all cases, sponsors shall serve under the direction of and in cooperation with the probation officers to whom the parolees are assigned.

§ 2.39 Mandatory release in the absence of parole.

A prisoner shall be mandatorily released by operation of law at the end of the sentence imposed by the court less such good time deductions and extra good time deductions as he may have earned through his behavior and efforts

at the institution of confinement. He shall be released as if on parole, under supervision until the expiration of the maximum term or terms for which he was sentenced less one hundred eighty days. Insofar as possible, release plans shall be completed before the release of any such prisoner.

§ 2.40 Same; youth offenders.

A prisoner committed under the Youth Corrections Act must be initially released conditionally under supervision not later than two years before the expiration of the term imposed by the court.

§ 2.41 Reports to police departments of names of parolees; statement of policy.

Names of parolees under supervision will not routinely be furnished to a police department of a community, except as required by law. All such notifications are to be regarded as confidential.

§ 2.42 Community supervision by United States Probation Officers.

(a) Pursuant to section 3655 of title 18 of the United States Code, United States Probation Officers are required to provide such parole services as the Attorney General may request. The Attorney General has delegated his authority in this regard to the Board (28 CFR 0.126(b)). In conformity with the foregoing, proba-

tion officers function as parole officers and provide supervision to parolees and mandatory releasees under the Board's jurisdiction.

(b) A parolee or mandatory releasee may be transferred to a new district of supervision with the permission of the probation officers of both the transferring and receiving district, provided such transfer is not contrary to instructions from the Board.

§ 2.43 Duration of period of community supervision.

(a) Any prisoner, with the exception of those sentenced prior to June 29, 1932, who is released under the provisions of laws relating to parole, shall continue until the expiration of the maximum term or terms specified in his sentence without deductions of allowance for good time. Prisoners sentenced prior to June 29, 1932, shall receive reductions in their maximum term or terms of imprisonment for such good time allowances as may be authorized by law.

(b) The Regional Director may discharge from supervision prior to the normal expiration date as provided in § 2.46(b), but the sentence is not thus commuted and such a parolee may be reinstated to supervision or retaken on the basis of a violator warrant.

§ 2.44 Conditions of release.

The conditions of release are printed on the release certificate and are binding regardless of whether the releasee signs the certificate. The Board, or a member thereof, may add special conditions or modify the conditions of release at any time.

§ 2.45 Travel by parolees and mandatory releasees.

(a) The probation officer may approve travel outside the district without approval of the Regional Director in the following situations:

(1) Vacation trips not to exceed thirty days,

(2) Trips, not to exceed thirty days, to investigate reasonably certain employment possibilities,

(3) Recurring travel across a district boundary, not to exceed fifty miles outside the district, for purposes of employment, shopping, or recreation.

(b) Specific advance approval by the Regional Director is required for other travel, including travel outside the continental limits of the United States, employment more than fifty miles outside the district, and vacations exceeding thirty days. A special condition imposed by the Regional Director prohibiting certain travel shall supersede any general rules relating to travel as set forth above.

§ 2.46 Supervision reports, modification and discharge from supervision.

(a) All parolees and mandatory releases shall make such reports to the United States Probation Officers to whom they have been assigned as may be required by the Board or Probation Officers. Probation Officers shall submit summary reviews of the progress of parolees and mandatory releasees according to Board policy. On the basis of summary reviews of the progress of parolees, the Regional Director may modify the reporting requirement of parolees or releasees.

(b) After the parolee or mandatory releasee has been under supervision for at least one year, the Regional Director may, in his discretion, permit the parolee to submit a written report to his probation officer on a less frequent basis than once a month. After a period of such reduced reporting the Regional Director may further order that the parolee be discharged from all supervision by the Probation Officer. In the latter instances, a parolee may be reinstated to supervision or a warrant may be issued for him as a violator at any time prior to the expiration of the sentence or sentences imposed by the court. Other modification in the reporting requirements may be made by the Regional Director at any time during the parolee's term.

§ 2.47 Modification and discharge from supervision; youth offenders.

A committed youth offender may remain under supervision until the expiration of his sentence or he may be released from supervision or unconditionally discharged at any time after one year of continuous supervision on parole.

§ 2.48 Setting aside conviction.

When an unconditional discharge has been granted to a youth offender prior to the expiration of his maximum term of sentence, his conviction shall be automatically set aside and the Regional Director shall issue to the youth offender a certificate to that effect.

§ 2.49 Revocation of parole or mandatory release.

(a) If a parolee or mandatory releasee violates any of the conditions of his release, and satisfactory evidence thereof is presented to the Board, or a member thereof, a warrant may be issued and the offender returned to an institution. Warrants shall be issued or withdrawn only by the Board, or a member thereof.

(b) A warrant for the apprehension of any parolee shall be issued only within the maximum term or terms for which the prisoner was sentenced.

(c) A warrant for the apprehension of any mandatory releasee shall be issued

only within the maximum term or terms for which the prisoner was sentenced, less one hundred eighty days.

§ 2.50 Same, youth offenders.

In addition to issuance of a warrant on the basis of violation of any of the condition of release, the responsible Regional Director may, when he is of the opinion that such youth offender would benefit by further treatment direct his return to custody or issue a warrant for his apprehension and return to custody. Upon his return to custody, such youth offender shall be given a revocation hearing under the same provisions as adult offenders as specified in § 2.54 to § 2.56. Following the revocation hearing parole may be reinstated, revoked or the terms and conditions thereof may be modified.

§ 2.51 Unexpired term of imprisonment.

The time a prisoner was on parole or mandatory release is not credited to the service of his sentence if revocation occurs. When a warrant is issued the sentence ceases to run, but begins to run again when the releasee is taken into Federal custody by the execution of the Board's violation warrant. However, the sentences of prisoners committed under the Narcotic Addict Rehabilitation Act or the Youth Corrections Act run uninterruptedly from the date of conviction

without regard to any revocation, except as provided in § 2.10(c). In no case may the commitment of a person under the Federal Juvenile Delinquency Act extend past his twenty-first birthday.

§ 2.52 Execution of warrant; notice of alleged violations.

(a) Any officer of any Federal correctional institution, or any Federal officer authorized to serve criminal process within the United States, to whom a warrant shall be delivered shall execute such warrant by taking such prisoner and returning him to the custody of the Attorney General. The warrant shall be considered delivered to a Federal officer when the warrant is signed and placed in the mail at the Board headquarters or regional office before the expiration of the maximum term of sentence.

(b) On arrest of the prisoner the officer executing the warrant shall deliver to him a copy of the Warrant Application listing the alleged violations of parole or mandatory release upon which the warrant was issued.

(c) If execution of the warrant is delayed pending disposition of local charges, for further investigation, or for some other purpose, the parolee or mandatory releasee is to be continued under supervision by the probation officer until the normal expiration of the sentence, or

until the warrant is executed, whichever comes first. Monthly supervision reports are to be submitted, and the releasee must continue to abide by all the conditions of release.

§ 2.53 Warrant placed as a detainer and dispositional interview.

(a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.

(b) Following the dispositional review the Regional Director may:

(1) Let the detainer stand

(2) Withdraw the detainer and close the case if the expiration date has passed;

(3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release.

(4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

(c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual reviews relative to the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

§ 2.54 Revocation by the Board, preliminary interview.

(a) A prisoner who is retaken on a warrant issued by a Board Member shall be given a preliminary interview by an official designated by the Regional Director to determine if there is probable cause to hold the prisoner for a revocation hearing and, if so, whether such revocation hearing should be conducted in the locality of the charged violation(s) or in a Federal institution. The official designated to conduct the preliminary interview may be a United States Proba-

tion Officer in the district where the prisoner is confined, provided he is not the officer who recommended that the warrant be issued.

(b) At the beginning of the preliminary interview, the hearing officer shall explain the Board's revocation procedure to the prisoner and shall advise the prisoner that he may have the preliminary interview postponed so that he may obtain representation by an attorney or may arrange for the attendance of witnesses. The prisoner shall also be advised that if he cannot afford to retain an attorney he may apply to a United States District Court for appointment of counsel to represent him at the preliminary interview and the revocation hearing. The prisoner may also request the presence of persons who have given information upon which revocation may be based. Such adverse witnesses shall be requested to attend the preliminary interview unless the prisoner admits a violation or has been convicted of a new offense committed while on supervision or unless the hearing officer finds good cause for their non-attendance. At the preliminary interview the hearing officer shall review the violation charges with the prisoner, receive the statements of witnesses and documentary evidence on behalf of the prisoner, and allow cross-examination of those adverse witnesses in attendance.

(c) At the conclusion of the preliminary interview, the hearing officer shall prepare and submit to the Regional Director a summary of the interview, which shall include recommended findings of whether there is probable cause to hold the prisoner for a revocation hearing. Upon receipt of the summary of the preliminary interview, the Regional Director shall either order the prisoner reinstated to supervision, order that a revocation hearing be conducted in the locality of the charged violation(s), or direct that the prisoner be transferred to a Federal institution for a revocation hearing.

(d) The prisoner shall be retained in local custody pending completion of the preliminary interview, submission of the summary of the hearing officer, and notification by the Regional Director relative to further action.

(e) A postponed preliminary interview may be conducted as a local revocation hearing, by an examiner panel or other hearing officer designated by the Regional Director provided that the prisoner has been advised that the postponed preliminary interview will constitute his final revocation hearing.

§ 2.55 Local revocation hearing.

(a) If the prisoner requests a local revocation hearing prior to his return to

a Federal institution, he shall be given a revocation hearing reasonably near the place of an alleged violation if the following conditions are met:

(1) The local hearing would facilitate the production of witnesses or the retention of counsel;

(2) The prisoner has not been convicted of a crime committed while under supervision; and

(3) The prisoner denies that he has violated any condition of his release. Otherwise, he shall be given a revocation hearing after he is returned to a Federal institution. However, the Regional Director may, on his own motion, designate a case for a local revocation hearing.

(b) If there are two or more alleged violations, the hearing shall be conducted near the place of the violation chiefly relied upon as a basis for the issuance of the warrant, as determined by the Regional Director.

(c) Following the hearing the prisoner shall be retained in custody until final action is taken relative to revocation or reinstatement, or until other instructions are issued by the Regional Director.

§ 2.56 Revocation hearing procedure.

(a) A revocation hearing shall be conducted by a hearing examiner panel or, in a local revocation hearing only, by another official designated by the Regional Director. In the latter case, the

decision relative to revocation shall be made by an examiner panel on the basis of the hearing summary pursuant to the provisions of § 2.23. A revocation decision may be appealed under the provisions of § 2.25, § 2.26, or § 2.27 as applicable.

(b) The purpose of the revocation hearing shall be to determine whether the prisoner has violated the conditions of his release and, if so, whether his parole or mandatory release should be revoked or reinstated.

(c) The alleged violator may present voluntary witnesses and documentary evidence in his behalf. However, the presiding hearing officer or examiner panel may limit or exclude any irrelevant or repetitious statement or documentary evidence.

(d) If the alleged violator has not been convicted of a new criminal offense while under supervision and does not admit violation of any of the conditions of his release, the Board shall, on the request of the alleged violator or on its own motion, request the attendance of persons who have given statements upon which revocations may be based. Those adverse witnesses who are present shall be made available for questioning and cross-examination in the presence of the alleged violator unless the presiding hearing officer or examiner panel finds good cause for their non-attendance.

(e) All evidence upon which the finding of violation may be based shall be disclosed to the alleged violator at the revocation hearing. The hearing officer or examiner panel may disclose documentary evidence by reading or summarizing the appropriate document for the alleged violator.

§ 2.57 Disclosure of records.

(a) Prior to any parole hearing conducted in his case pursuant to §§ 2.13, or 2.14, or at any time during his incarceration, a prisoner is entitled to review reports in his institution file containing factual material bearing on his offense behavior, personal history, and institutional progress, as provided in Bureau of Prisons Policy Statement No. 2211.8, dated June 12, 1975, provided that disclosure of such reports would not (1) threaten the life or physical safety of any person; (2) interfere with law inforcement proceedings; (3) disclose investigative techniques of a law enforcement agency; or (4) constitute a cleary unwarranted invasion of personal privacy. The reports to be disclosed to the prisoner, subject to the above exceptions, include but are not limited to the following:

(i) Sentence Computation Records;

(ii) Classification material (including progress reports);

(iii) Incident (disciplinary) reports;

(iv) Medical reports;

(v) F.B.I. identification reports (rap sheets).

(b) All requests for disclosure of documents in the institution file shall be addressed to the Bureau of Prisons staff at least seven days prior to the time such documents are to be viewed. Copies of documents will be furnished under applicable Bureau of Prisons regulations.

(c) Sole authority to disclose a Presentence Investigation Report is retained by the prisoner's sentencing court. A request for disclosure of the Presentence Investigation Report must be addressed to the Court which originated the document.

(d) Copies of documents contained in Board of Parole Regional Office files shall be made available to prisoners, their authorized representatives, and other persons, upon written request in accordance with applicable law and Department of Justice Regulations at 28 C.F.R. Part 16, Subparts C and D. The Board reserves the right to invoke statutory exemptions to disclosure in appropriate cases.

§ 2.58 Special parole terms.

(a) The Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 801 to 966, provides that, on conviction of certain offenses, mandatory "special parole terms" must be imposed by the court as part of the sentence. This term is an additional period of supervision which follows the completion of the regular sentence, including completion of the supervision

period of such regular sentence on parole or mandatory release.

(b) At the time of release under the regular sentence, whether under full term expiration or under a mandatory release certificate or a parole certificate, a separate Special Parole Term certificate will be issued to the prisoner by the Bureau of Prisons.

(c) Should a releasee be found to have violated conditions of release during supervision under his regular sentence, i.e., before commencement of the Special Parole Term, he will be returned as a violator of his basic supervision period under his regular sentence; the Special Parole Term will follow unaffected. Should a releasee violate conditions of release during the Special Parole Term, he will be subject to revocation with the complete Special Parole Term to serve (but none of the separate regular sentence), and subject to reparole or mandatory release under the Special Parole Term.

(d) If the prisoner is reparoled under the revoked Special Parole Term a certificate of parole to Special Parole Term is issued by the Board. If the inmate is mandatorily released under the revoked "special parole term" a certificate of mandatory release to Special Parole Term will be issued by the Bureau of Prisons.

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